Fluor Daniel, Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL—CIO and International Brotherhood of Electrical Workers, Local Union No. 995, AFL—CIO and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Plumbers & Steamfitters, Local Union No. 198, AFL—CIO. Cases 15—CA—12544, 15—CA—12666, 15—CA—12723, 15—CA—12852, 15—CA—12936, 15—CA—12938, 28—CA—12750, and 28—CA—13357

March 2, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On February 6, 1998, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel filed exceptions and a supporting brief and an answering brief to the Respondent's exceptions. The Respondent filed exceptions and a supporting brief, a memorandum in opposition to the Charging Parties' exceptions, and a reply brief to Charging Party Boilermakers' exceptions. Charging Party Boilermakers and Charging Party Pipefitters filed memoranda in opposition to the Respondent's exceptions and cross-exceptions and supporting briefs.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings,² findings,³ and conclusions and

to adopt the recommended Order as modified.⁴ As set forth below, the General Counsel alleged, and the judge found, that the Respondent discriminatorily refused to consider and hire 120 discriminatees at two Respondent jobsites based on their status as voluntary union organizers,⁵ and engaged in other related coercive or discriminatory conduct. We agree with the judge's conclusions for the reasons stated herein.

³ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find without merit the Respondent's allegations of bias. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence. Nor does it demonstrate bias that the judge permitted cross-examination of the Respondent's witnesses regarding their conduct at other jobsites. It is relevant to motive that Respondent agents at other locations committed prior unfair labor practices of the same type as alleged here. *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 395 (1998).

Finally, we find that the judge properly relied on Rule 103 of the Federal Rules of Evidence to preclude cross-examination of Gary Evenson concerning his conduct in an unrelated proceeding before a different judge.

⁴ The General Counsel and the Charging Parties have excepted to the judge's refusal to grant a nationwide remedy and to order national posting and mailing to all Respondent employees and applicants. Based on our conclusion, set forth infra, that the Respondent's hiring criteria, as applied, unlawfully discriminated against union activist applicants in Arizona and Louisiana, and our earlier decisions making similar findings with respect to other Respondent jobsites in other parts of the country, see fn. 6, infra, we find merit in these exceptions and modify the Order accordingly. Additionally, we correct the judge's inadvertent errors in omitting his recommended testing remedy from the Order and in misspelling discriminatee Ronnie Penny's name in the Order.

The General Counsel and the Charging Parties have also excepted to the judge's failure to grant certain additional remedies, including union access to company bulletin boards; furnishing a list of employee names and addresses to the Unions; maintenance of applications and statements explaining reasons for hire or rejection, and inspection of those records by Board agents; and establishing, following, and posting at all construction jobsites a uniform and fair employment application and hiring policy. We decline to order those remedies.

Issues concerning the applicability of *Dean General Contractors*, 285 NLRB 573 (1987), to the instant case can be raised in the compliance proceeding.

⁵ The General Counsel also alleged that the Respondent unlawfully refused to consider and hire five union activist applicants for rebar helper positions at the Louisiana site; however, the judge recommended dismissing those allegations. Because we agree, for the reasons stated infra, that there was insufficient evidence to support the refusal to hire allegations, we adopt the judge's recommendation and dismiss those allegations. We reverse the judge, however, and find that the Respondent did unlawfully refuse to consider those five applicants for rebar positions.

¹ In addition, on June 14, 2000, the Board invited the parties to submit briefs addressing the framework of *FES*, 331 NLRB 9 (2000), including whether—under that framework—the record is sufficient to decide the issues presented. The General Counsel, the Respondent, and Charging Party Pipefitters filed briefs. Having fully considered those briefs, and the record as a whole, we have concluded that the current record is sufficient.

² We find no merit in the Respondent's exception contending that the General Counsel's challenge to the Respondent's hiring preferences is untimely pursuant to Sec. 10(b) of the Act. There is no allegation that the policies are facially unlawful; accordingly, it is not relevant that the policies were implemented more than 6 months prior to the charge. We likewise reject the contention that *Jefferson Chemical*, 200 NLRB 992 (1972), precludes litigation of hiring preference allegations that were not raised in two prior proceedings, summarized infra at fn. 6, that involved the Respondent's hiring practices. *Jefferson Chemical* is inapposite: the prior proceedings concerned different worksites, different discriminatees, and different events. Moreover, the General Counsel is not precluded from litigating claims because of their proximity in time to prior proceedings involving the same respondent. See *Harrison Steel Castings*, 255 NLRB 1426 (1981); *Maremont Corp.*, 249 NLRB 216 (1980).

INTRODUCTION

This is the third in a series of cases alleging that the Respondent's hiring practices have unlawfully discriminated against applicants for employment who evinced an interest in exercising rights protected by the Act.⁶ The Respondent, which operates on a nonunion basis, is a large construction company. The Respondent has for many years maintained a detailed, written protocol governing hiring standards, policies, and procedures for craft employees. The protocol, which is facially valid, accords preference in hiring to former employees who have been certified through the Respondent's in-house craft certification program. In this case, and in the two earlier proceedings, however, the scope of the preference was expanded, without the authorization that the protocol required,⁷ to include any applicant who had previously worked for the Respondent.

In the two earlier proceedings, Fluor Daniel I and II, the General Counsel did not challenge the hiring preference system. There the General Counsel alleged only that the Respondent had unlawfully discriminated among applicants who were not former employees by giving favorable consideration to those who were not voluntary union organizers, while excluding from consideration those who were. In those cases, the Board concluded

⁶ These four proceedings are summarized below:

Fluor Daniel I: 304 NLRB 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992). The Board ordered employment offers and backpay to 13 discriminatees who applied for employment at a project in Georgia.

Fluor Daniel II, 311 NLRB 498 (1993), enfd. in part, remanded in part, 161 F.3d 953 (6th Cir. 1998). The Board ordered employment offers and backpay to 55 discriminatees who applied for employment at various Respondent jobsites in Kentucky. The United States Court of Appeals for the Sixth Circuit affirmed the Board's theory of the violation, but remanded the case for determination whether specific vacancies existed that the discriminatees could fill. The Board has accepted the remand

Fluor Daniel III: the case before us. The consolidated complaint alleges that in order to discourage employees from engaging in protected activities the Respondent refused to consider or hire the discriminatees and gave "preference for hiring to former employees and to applicants recommended by its supervisors, agents, and employees."

Fluor Daniel IV: This complaint, currently pending trial, makes the same hiring preference allegations as Fluor Daniel III with respect to 130 job applicants at two Respondent projects in Louisiana. Complaint in IV issued while III was in trial. The General Counsel moved to consolidate IV with III. The Respondent opposed the motion and the judge denied it, noting that additional delay would be unfair to the parties in III.

⁷ The Respondent's craft hiring rules were codified in its human resources manual, in effect since at least 1972. Modifications to hiring policies and practices require written approval from the vice president for human resources. The human resources manual was never modified to extend a hiring preference to noncertified former employees, nor did the vice president for human resources approve such a policy change. The same is true for all other deviations from company hiring policy at issue or relied on as defenses in this case.

that the Respondent had engaged in the discrimination alleged and had "offered no credible reasons" for treating applicants disparately. One of the factors underlying the Board's conclusion in *Fluor Daniel II* was that the Respondent had disparately enforced a rule limiting the effective period of employment applications so as to exclude union activists on the ground that their applications had expired. The same "inactive application" rationale is asserted as a defense in the case before us.

In this proceeding, Fluor Daniel III, the General Counsel alleges that the Respondent systematically applied its hiring preferences and policies to screen out union activists from consideration and to mask their exclusion with the guise of legitimacy. Thus, the General Counsel now alleges that the Respondent discriminated against voluntary union organizer applicants by treating them less favorably than all other applicants—not only nonactivist, nonpreferenced applicants, but also preferenced former employees. Accordingly, we now examine the Respondent's entire hiring system as the Respondent applied it at its Palo Verde Nuclear Generating project near Phoenix, Arizona, and at its Exxon refinery site at Baton Rouge, Louisiana. There are two evidentiary factors not available in prior proceedings: an emerging pattern of discrimination, and subsequent documents and testimony evidencing discriminatory intent at the corporate level.

On the basis of discriminatory corporate policies and field practices implementing them at the two jobsites, we conclude that the Respondent unlawfully applied its system of hiring preferences, policies, and procedures so as to refuse to consider or hire 120 voluntary union organizers who applied to work there. We also find that the Respondent engaged in associated threats, coercive statements, and retaliatory conduct.

I. CORPORATE POLICIES

We address first the Respondent's corporate level preparations for staffing the two projects. The Respondent, Fluor Daniel, is the nonunion subsidiary of Fluor Corporation, a holding company that also has a union subsidiary, Fluor Constructors. Fluor Daniel has a nonunion subsidiary called TRS. Fluor Constructors, Fluor Daniel, and TRS are all separate corporations with separate boards, officers, labor relations, and personnel policies. Fluor Daniel extends its hiring preference to former

⁸ Fluor Daniel II, 311 NLRB at 500; Fluor Daniel I, 304 NLRB at 971.

⁹ Because we find that the Respondent applied its hiring policies and preferences in an unlawful manner, we find it unnecessary to reach Charging Party Boilermakers' argument that the Respondent's hiring policies were inherently destructive of protected rights, and invalid per

employees of nonunion TRS, but not to former employees of unionized Fluor Constructors or to its own former employees from direct-hire union jobs. ¹⁰ The rationales offered by corporate officers for excluding unionized former employees were that unionized employees were not employees of Fluor Daniel but of the Union or that such employees would be loyal to the Union and not to the Respondent.

The Respondent's hiring preference was originally codified in its craft employee hiring manual, a part of the Respondent's human resources manual, and favored only those certified through Fluor Daniel's in-house certification program. Company certification requires 42 months of craft experience and passing a test. 11 Other relevant craft hiring policies provided that applications expired after 60 days and had to be submitted in person. 12 Modifications to craft hiring rules required written approval by the vice president for human resources.

At the jobsites involved in this and the two preceding cases, the hiring preference had in practice come to be extended to any craft applicant who had previously worked for Fluor Daniel, with those who were certified ranking above those who simply had Fluor Daniel experience. Additional rules adopted in the field were that applications would not be accepted unless positions were open, ¹³ and that applicants could apply and be considered for only one position. The vice president for human resources did not approve these hiring policy deviations. ¹⁴

In 1993, the Respondent bid on the two jobs involved in this case: the Exxon refinery project in Baton Rouge,

Louisiana, where the Respondent rebuilt a coker plant that had been destroyed by fire, and the Palo Verde project, where the Respondent took over maintenance of a nuclear power plant outside Phoenix, Arizona. Palo Verde Nuclear Generating Station, the largest nuclear power facility in the United States, was built by Bechtel Corporation, a well known union contractor, and—until the time of the Respondent's successful bid—had been maintained by Bechtel under successive contracts with Arizona Public Service Company (APS). 15

A. Palo Verde

Prior to bidding on the Palo Verde job, the Respondent performed a wage survey of the Phoenix area. The survey stated that the Respondent would need to rely on other parts of the country to find "open shop" metal craft employees with nuclear experience, because hiring locally in those crafts presented the Respondent's "greatest risk" of picking up union workers. ¹⁶ In contrast, the survey concluded that workers in trades that were not organized in the Phoenix area, such as painting, carpentry, and utility, could be obtained without looking elsewhere.

The Respondent's bid to Arizona Public Service, called the Palo Verde Staffing Plan, stressed to APS that the Respondent had successfully made the transition from union shop to open shop many times, and that it would work with APS to do the same at Palo Verde. The Staffing Plan assured APS that "open shop" would guarantee that employees would be loyal to APS and Fluor Daniel—rather than to the union—and emphasized that the Respondent had a national network of nonunion craft workers from which it would recruit to fill positions at Palo Verde. 17 The Respondent's bid acknowledged the value to the client of prior nuclear experience and represented that the Respondent would canvass the present, experienced Bechtel employees for nuclear workers with acceptable skills and "philosophies." The Respondent admitted that it did not make an effort to recruit from the unionized Bechtel work force.

B. Exxon

The Respondent was awarded the Exxon contract in 1993. In December 1993, its industrial relations department issued a memorandum to human resources, an ob-

¹⁰ On rare occasions, when a contract requires it, the Respondent has hired—as its own employees—a unionized work force. Typically, however, Fluor Daniel staffs its projects with nonunion direct hires or by contracting the work out.
¹¹ The 42-month experience requirement functioned as the equiva-

The 42-month experience requirement functioned as the equivalent of journeyman status. It was also stated to be a minimum requirement for nonformer employee applicants seeking journeyman work.

¹² As noted, the Respondent's hiring protocol provided that craft applications remained valid only for a period of time, i.e., 60 days. That rule is not attacked as discriminatorily motivated. In compliance with the protocol, the 60-day period applied to applications submitted at Palo Verde. It would have applied at Exxon as well, but as discussed infra, sec. 1B, a directive from industrial relations reduced the period to 30 days just prior to the commencement of hiring. Although the reduction at Exxon is not alleged as an independent violation, it is relied upon as a factor supporting the allegations of discriminatory refusal to consider and hire. Finally, as discussed infra, the rule at both places was discriminatorily applied.

¹³ The Respondent's protocol does not relate the commencement of an application's effective period to the existence of actual job openings at the time of its submission. In any event, this uncodified field rule at Exxon and Palo Verde prohibited recruiters from accepting applications unless openings existed at that time in the craft applied for. At Palo Verde, the rule appears to have been communicated orally. At Exxon, it was included in the Martinez memo, infra, sec. 1B.

¹⁴ See fn. 7, supra.

¹⁵ APS oversees utility companies in the State of Arizona.

¹⁶ In view of the significant evidence of animus in this case, we are not persuaded by the Respondent's assertion that the "risk" identified in the wage survey referred only to the "open-shop, direct-hire" wage structure it was contemplating.

¹⁷ Should the pool be inadequate to staff the job and advertising become necessary, the Respondent's bid outlined three nonunion target groups: nonunion workers working under permit from an incumbent union, employees of other open-shop contractors, and Phoenix area nonunion craft workers who typically traveled elsewhere for work.

ject of which was to "protect ourselves from unfair labor practice charges." The memorandum, which advised that "it is essential that this [sic] criteria be strictly adhered to," directed Exxon recruiters to implement new restrictions on the hiring process, the most important of which was to reduce the period during which applications were considered active from 60 to 30 days. None of the recruiters or corporate officers who testified articulated a business justification for cutting the active application period in half. Senior Industrial Relations Specialist Ed Martinez, who wrote the memorandum, testified that each of the hiring practices it directed was for the purpose of remaining nonunion on direct-hire jobs.

C. Both Sites

Exxon staffing commenced in January 1994; by December 1994 when the project ended, the Respondent had hired nearly 2800 employees. The Respondent began staffing the Palo Verde project in June 1994; by February 1996, it had hired 962 craft employees on core and outage crews.¹⁹ Both projects relied heavily on telephone and mailgram recruiting. Most mailgrams were directed to out-of-state recipients. Exxon recruiters continuously solicited applications from former employees by accessing the Respondent's craft availability database, calling jobsites that were closing down, and maintaining a telephone log of all individuals who called looking for work. Palo Verde recruiters also routinely used the database to access histories of preferenced applicants; in addition, they engaged in extensive telephone solicitation of persons who had never worked for Fluor Daniel and had no application on file. Large proportions of both work forces were made up of employees from outside the area and outside the state. Significant percentages of those hired at Palo Verde had no prior nuclear experience.20

II. VOLUNTARY UNION ORGANIZERS

Once it became known that the Respondent had the Exxon and Palo Verde jobs, area trade unions decided they would allow members to apply for work at Exxon and Palo Verde as voluntary union organizers. At both sites, participation in the organizing effort was voluntary and uncompensated. Voluntary union organizers agreed to accept employment if offered, to stay until laid off, to do a good job, and not to engage in aggression or sabotage. Participants agreed to discuss the benefits of union representation with other employees and to record notes of actions that appeared to interfere with protected rights.²¹

In Baton Rouge, IBEW Local 995 Business Agent Kendrick (Ricky) Russell and Pipefitters Organizer Jeff Armstrong coordinated the organizing effort. Participants came primarily from IBEW Local 995, Pipefitters Local 198, and Boilermakers Local 582. Boilermakers Organizer Gary Evenson coordinated the organizing effort at Palo Verde. Participants came primarily from Boilermakers Local 627, Millwright Local 1914, Ironworkers Local 75, Asbestos and Insulators Local 73, Electricians Local 640, Cement Masons Local 394, and Carpenters Local 408.

At both sites, the alleged discriminatees traveled to the recruiting offices in groups, ranging in size from 2 to 26. They wore union hats, shirts, and buttons. They identified themselves on their applications as voluntary union organizers. Their applications contained other indicia of union affiliation, including their apprenticeship training, past employment with union contractors, listing union scale as wages, and providing union officers as references.

III. HIRING AT EXXON

A. Application Process

Staffing at Exxon commenced with 3 weeks of open recruiting. Between late December 1993 and January 19, 1994, Exxon recruiters accepted nearly 700 applications in all crafts, regardless of whether there were openings in the craft or whether the applications were likely to be acted upon in the next 30 days. This included applications from electricians and pipefitters—the alleged discriminatees' crafts. The Respondent did not anticipate

¹⁸ No authority entitled industrial relations personnel to make human resources policy changes. See fn. 7, supra. Applications in use at Exxon stated that they were valid for 60 days. Witnesses explained that there had been no time to order new forms.

¹⁹ There were two outages a year when the reactor was shut down in whole or in part for refueling and maintenance.

²⁰ We note here that wherever we consider hiring statistics at either site, and the figures submitted by the parties differ, we have used the Respondent's data. We thus analyze the case in the light most favorable to the Respondent. This does not imply that we have accepted the Respondent's figures as more accurate.

We find without merit the Respondent's exception contending that evidence of statistical disparities cannot properly be considered, because the disparate impact theory used in Title VII proceedings is not available under the NLRA. We believe that the evidence, quite apart from the statistical data, supports the violations. The statistical data show the predictable consequences of that discrimination.

²¹ We find without merit the Respondent's contention on exception that a purpose of the organizing campaigns at Exxon and Palo Verde was to force the jobs to close down. We also note that there is neither evidence nor claim that union organizers, voluntary or paid, engaged in disruptive practices, broke laws, or committed unfair labor practices at Exxon and Palo Verde.

significant hiring in those trades for another 3 months.²² Senior Site Manager Bill Austin testified that he implemented open recruiting because he thought it would be prudent to have a reserve of qualified applicants to draw on during anticipated peak times. He acknowledged that accepting open applications violated both the Respondent's hiring rules and the Martinez memo and that he had not received authorization for these deviations from company policy. Austin further testified that the 30-day rule operated at cross-purposes to hiring the most qualified applicants.

On January 19, the position of "Electrician" was posted on the job notice board outside the Exxon recruiting office. That day the first union electricians arrived at the site and applied for employment, wearing union insignia and noting on their applications that they were voluntary union organizers. The next day, the "Electrician" posting came down and open recruiting ceased.

On five other occasions between January 25 and May 10, groups of voluntary union organizers submitted applications at the Exxon recruiting office. All of the alleged discriminatees were well qualified with many years of craft experience. None of them was hired, interviewed, questioned, or contacted. Recruiters did not tell the alleged discriminatees that applications were valid only for 30 days or that journeyman applications had to reflect 42 months of craft experience. Recruiters reviewed and accepted the alleged discriminatees' applications without indicating that they failed to meet minimum hiring requirements. Those discriminatees who specifically asked if their applications were complete or

²² Before wiring or piping could take place the building shell needed to be reconstructed. Peak demand for electricians and pipefitters was anticipated to arise in April, May, and June. "OK" were told nothing to alert them to the disqualification rules. When alleged discriminatees made follow up calls, recruiters pulled their applications and reviewed them with the callers, but did not advise them that their applications were deficient. Recruiters did inform them that their applications had expired because they were more than 30 days old, and that they could not renew them or reapply because their crafts were not then posted.

In August, the Respondent hired two open union activists. Late that month, Ed Martinez from industrial relations told recruiter Rhonda Glover that it would improve the chances that NLRB Region 15 would not issue complaint against the Respondent if the Respondent could show that it had hired some union-affiliated applicants. On August 29, Glover called Charles Dame, an open union activist who had applied that day, and asked him to come into the office and expand his application by listing 42 months of job experience. Dame had not been told of the 42-month requirement when he filed his application. The next day Dame completed a second application and was hired. Also on August 29, IBEW Business Agent Ricky Russell, came in and applied, responding to an ad for electricians in the previous day's paper. Glover hired Russell. Russell had not been hired on January 19 when he had applied as a voluntary union organizer. These union activist hires took place 8 months after the Exxon project commenced and 4 months after its originally anticipated peak need for electricians.

B. Defenses

The Respondent gave three primary reasons for not hiring the alleged discriminatees at Exxon: that they were not preferenced,²⁷ that their applications had expired when positions in their crafts became open, and that their applications did not reflect 42 months of craft experience. For the reasons set forth below, we conclude that these reasons are pretexts.

1. Hiring preference defense

Nearly one-fifth of Exxon journeymen hires were nonpreferenced applicants. Thus, the Respondent's failure to hire the alleged discriminatees cannot be explained solely on the basis of hiring preferences. Further, as seen below, the manner in which the Respondent implemented its hiring preferences is evidence of antiunion animus.

²³ In addition to the 10 electricians who applied on January 19, 4 electricians applied on January 25, 5 electricians on January 26, 7 pipefitters and 8 boilermakers on February 1, 1 pipefitter on February 2, 2 electricians on April 19, and 4 pipefitters on May 10. In addition, one electrician applied on July 20 and five applied on August 28, 29, and 30.

²⁴ The single exception was Donald Broussard, an electrician who applied on April 19. The judge dismissed as to Broussard, finding that, based on his application, which did not reflect work in the trade during the previous 2 years, together with his youth, Broussard did not appear qualified. There were no exceptions to these findings or to the dismissal, which we adopt pro forma.

²⁵ Austin and David Bordages, the Respondent's vice president for human resources, construction division, testified that they would expect recruiters to review applications, tell applicants if something was wrong, and—preferably while the applicant was still there—ask questions and get clarification, if needed, about work experience. The alleged discriminatees gave their applications to recruiters Glover and Wilson. Glover and Wilson did not follow these practices with respect to the alleged discriminatees.

²⁶ On April 19 recruiters instructed five union rebar helpers and two union electricians that applications must reflect 42 months experience. This single instance occurred shortly after the first charge was filed.

²⁷ One alleged discriminatee, Boilermakers International Representative Kenny Bueche, was a preferenced former employee; the Respondent stated that it did not hire him because it did not have his application. The judge credited Bueche that he had submitted an application and found that the Respondent had in its possession other applications submitted with his.

The Respondent routinely made exceptions to its hiring rules in favor of preferenced applicants, both those who were certified and those who had merely worked for the company before.²⁸ The Respondent's craft hiring protocol does not exempt preferenced employees from compliance with application procedures and minimum employment standards.²⁹ In contravention of the protocol, however, recruiters hired former employee applicants who did not have 42 months of craft experience, who had been certified in crafts other than those in which they were hired, who had never submitted applications or whose applications had expired, or who were considered for crafts other than those they had applied for. Recruiters made no exceptions to these rules that would have benefited alleged discriminatees.

Finally, the asserted basis for the hiring preference was the Respondent's desire for employees with proven skills and work records. Nevertheless, under the preference's aegis, the Respondent hired seven former employees whom it knew to have been convicted of violence and weapons crimes or to have been terminated, some more than once, for absenteeism, insubordination, substance use, or endangering safety. In light of other disparities, discussed infra, we conclude that the Respondent accorded preference in hiring to at least some former employees based, not on its knowledge of their skills and work records, but on their perceived attitudes toward union organizing.

2. Inactive application defense

The 30-day rule was the one to which the Respondent attached the most importance. The Respondent instructed recruiters never to deviate from the 30-day rule. Neither recruiters nor Austin explained why, other than that it was a "good rule." The Respondent adhered to the 30-day limitation, even when it was apparently against financial self-interest to do so. From August through October, the Respondent experienced persistent difficulty staffing the Exxon project with pipefitters, pipewelders, and electricians. The Respondent resorted to advertising in local and out-of-state papers, sent 23,500 mailgrams soliciting applications from former employees, and sub-

contracted with three nonunion subcontractors to do electrical, pipefitting, and pipewelding work for which it had insufficient staff. Austin was asked why he had not turned to the alleged discriminatees' applications, which were still on file in his office. Austin testified that, although other hiring rules were breached on a regular basis, he would never consider an inactive application, even if it meant failing to staff a job properly.

The Respondent did not establish that it made efforts to advise the alleged discriminatees of the 30-day rule. It is undisputed that a sign somewhere in the hiring office contained a notice to that effect; however, the Respondent did not establish that the alleged discriminatees had seen it or that this critical rule had been communicated to them in any more direct way. Recruiters did not instruct the alleged discriminatees that their applications would be ineligible for consideration after 30 days, nor did the application forms give effective notice. The forms contained a small printed line stating that applications were valid for 60 days. When the alleged discriminatees' applications were submitted into evidence at trial, the "60" had been crossed out and "30" had been substituted by hand. The alleged discriminatees consistently testified that there were no cross-outs on the forms they submitted or that they had noticed none. No evidence suggested that the forms of nonactivist applicants had been altered without their knowledge.

Although the 30-day rule was enforced more rigorously than other rules, deviations in favor of nonactivist applicants occurred: 27 journeymen were hired more than 30 days after they applied. An additional 29 were hired before they applied, for a total of 63 journeymen (4 percent of journeyman hires) whose hires represented breaches of the 30-day rule or the rule against hiring before an application was submitted. No union activists benefited from similar rules breaches.

3. Insufficient experience defense

The Respondent argues that it required journeyman applicants to have 42 months of craft experience, and that as the alleged discriminatees' applications did not reflect this minimum experience, they were not considered. The Respondent's recruiters did not inform the alleged discriminatees that failure to list 42 months' craft experience on their application forms would disqualify them³¹ and the Respondent's application forms did not

²⁸ The Fluor Daniel experience preference benefited any applicant who had ever worked for the Company, including those whose employment had been brief, remote in time, or shorter than 42 months. Mailgram solicitations were sent to former employees who had not worked for the Company in 10 years. These individuals were treated to the same priority as certified applicants, thus, placing them above non-preferenced applicants who had more experience, and who had actually come to the hiring center in person to apply.

²⁹ Preferenced applicants would appear to be the natural objects of the Respondent's hiring policies: the Respondent's goal, expressly stated and effectuated through vigorous recruitment efforts, was to hire as many former employees as possible.

 $^{^{\}rm 30}$ See fn. 11, above, concerning 42 months' experience and journeyman status.

Two of the Respondent's recruiters testified that they gave all applicants standard instructions, including that applications for journeyman positions must reflect 42 months of craft experience and that supplemental sheets were available to list additional work history. The judge discredited this testimony. As set forth in fn. 26, above, he found

contain instructions to that effect. The application forms, which provided six lines for applicants to list all jobs held in the preceding 3-½ years, were not conducive to recording an extensive work history. Uncontroverted evidence showed that jobs in the alleged discriminatees' trades are typically of short duration, often a matter of weeks. One witness testified that a full 3-½-year record would require an application the size of a telephone book. The alleged discriminatees were not offered supplemental sheets or told that they were available.

Most of the alleged discriminatees had been working in their trades for 20 or 30 years and had sought employment many times. They typically filled in the six spaces or listed their last few jobs; there was no evidence that this deviated from construction industry practice. As noted above, many alleged discriminatees testified that they had requested recruiters to review their applications for sufficiency before accepting them. None was told then or later that they had listed too little experience. Further, many alleged discriminatees, with recruiter approval, attached resumes to their applications that contained complete job histories. Recruiters ignored their resumes and counted only employment that was written on the application form itself. Thus, the judge found, and we agree, that had the alleged discriminatees been told of the 42-month requirement, they could and would have supplied the requisite information.

The Respondent counted training at its own craft school toward the 42-month requirement,³² but gave no credit for the discriminatees' union apprenticeship training. The alleged discriminatees' applications consistently show 48-month apprenticeships, which exceed the 42-month requirement. The Respondent's recruiters failed to provide consistent or convincing explanations why they gave no credit for union apprenticeships but accorded full credit to company training, which in many instances was less extensive.³³ Accordingly, we find that the alleged discriminatees' applications reflected the requisite 42 months' experience.³⁴

that such instructions had only been given once, after most of the alleged discriminatees had already applied.

No applicants but the alleged discriminatees were held so inflexibly to the 42-month standard. Substantial numbers of former employees listed less than 42 months' experience on their applications. Recruiters attempted to explain the anomaly by stating that former employees were included in a companywide database that recruiters could check to see if such applicants had more experience than their applications reflected. There was no explanation why recruiters hired 43 former employees whom the database showed to have less than the requisite journeyman experience; of these, a significant number had 6 months' experience or less. There was no supported explanation why the Respondent hired as journeymen 124 nonpreferenced applicants whose applications showed less than 42 months' experience. Recruiters suggested that an "unwritten" exception for applicants referred by members of management, supervisors, or other employees could account for it. Testimonial evidence, however, linked only a handful of these hires to internal referrals, leaving the rest unexplained.³⁵ No similar rules breaches favored alleged discriminatees.

4. Other deviations from the hiring protocol

Having examined the Respondent's three main defenses, we turn to other deviations in hiring practices at Exxon. Pursuant to hiring procedures implemented in the field, craft applicants could submit only one application and could be considered only for the one position that the application sought. The Respondent's statistics show that the Respondent considered nearly two-thirds of all applicants for positions other than those for which

strong applied for a posted position as an ironworker. It is not disputed that pipefitters routinely do ironwork, which in general requires less skill than pipefitting. Armstrong listed his pipefitting employment, but specifically asked Teri Wilson, the recruiter who accepted his application, if he should go back and identify the jobs where he had performed ironwork. She told him that that would not be necessary. At the trial, Glover testified that Armstrong was "underqualified" for the job because his application did not list 42 months of ironwork experience.

Armstrong's experience is noteworthy for another reason. Armstrong applied a total of four times. In addition to the February 1 application, Armstrong applied on April 19 for a posted pipefitter helper position, but was rejected as "overqualified." On May 10 Armstrong and four other pipefitters applied to take the pipefitter certification test that the Respondent was administering that day. Because he and the others were not former Fluor Daniel employees, they were considered "not qualified" and were not allowed to test. (We agree with the judge that these five applied for employment as well as to test on May 10.) Finally, on July 20 Armstrong applied for the posted position of instrument helper, and was rejected as "overqualified."

³⁵ There was testimony to the effect that perceived nonunion applicants were given names of supervisors they had never met to use as "referral" sources in applying for work; however, this subject was not developed in depth.

Two years of instruction at the Respondent's craft school was often accepted in lieu of 42 months' experience. In addition, former employees who had some craft experience and some craft school training were accorded full credit, even when combined work and school experience fell well short of 42 months.

¹³³ Recruiters variously stated that they did not know what an apprenticeship was, that they did not realize that apprenticeships involved on-the-job work, or that they gave union apprenticeships half credit. The judge discredited the testimony of the Respondent's experienced recruiters that they were unaware of the nature or duration of union apprenticeship programs.

³⁴ The experience of Jeff Armstrong, an experienced pipefitter and paid Pipefitter organizer, illustrates this point. On February 1, Arm-

they had applied.³⁶ None of these were alleged discriminatees. Numerous applications contained multiple deviations. Two-thirds of craft employees hired prior to submitting applications had inadequate experience and two-fifths were considered for a different craft. Three-quarters of craft employees hired more than 30 days after they had submitted applications had inadequate experience and four-fifths were considered for other crafts. Of noncertified former employees with less than 42' months' experience, nearly two-thirds were considered for other crafts. All told, the Respondent's data revealed over 3000 known deviations from the Respondent's rules with respect to the hire of nonactivists. The same rules were applied to disqualify all alleged discriminatees from consideration.

C. Related Violations

There were two related violations at Exxon, and an event that, although not independently alleged to be unlawful, sheds light on the motives underlying the Respondent's hiring practices. All three incidents concern Dame and Russell, the two activist hires. Shortly after Russell's hire on August 30, Respondent Foreman Clint Bamber³⁷ told a group of employees that he had something to tell them that could get him in a lot of trouble. but that he felt they had a right to know who their coworkers were. He said that Ricky Russell had been hired, and that the hiring office must not know what they were doing, because Russell was the business agent in Baton Rouge. Bamber told the group that he wanted to get Russell on his crew so that he could get rid of him. There was no allegation concerning Bamber's statements.

About a month later, another foreman threatened Dame. During the month that Dame worked at the Exxon site he raised safety concerns about ladder stability and placement of power cords and welding leads. As a result, a scaffold was built and Dame moved cords and leads. Dame also questioned management about emissions from the coker that caused employees to feel nauseated and breathless. The morning of October 6, Dame questioned his foreman and a safety officer about the steam. He was told that the steam had been tested and that they would get him the results. When later that morning Dame had still not heard the results, he spoke to his foreman again. He was sent to the safety trailer, where he was told they might not want him to go back to work until they got the information. He spent most of

the rest of the morning being referred to, and waiting for, various management personnel. Prior test results were not produced. When he went back to the job, several other employees asked him about the steam situation. Around noon, Dame was taken to the emission site and a steam sample was collected. Dame was then sent back to work

On his way back, Foreman Chuck Robinson, 38 who was not Dame's foreman and for whom Dame had never worked, approached Dame and told him to "quit fucking up." Dame had never been disciplined or told that his work was deficient. Dame said, "What do you mean by that?" Robinson replied, "You know what I mean." Dame asked, "Do you mean about the steam?" Robinson smiled and walked away. The next day Dame asked him again what he meant, but Robinson denied ever talking to him. The judge discredited Robinson's testimony and found that Robinson's statements constituted an unlawful implied threat. We agree. We reject the Respondent's argument that this incident is not unlawful because Robinson had no hiring authority³⁹ and find that Robinson's statements threatened unspecified retaliation in violation of Section 8(a)(1).

Shortly after the Robinson threat, Dame announced that he was joining Russell in an asserted unfair labor practice strike protesting the Respondent's failure to hire union affiliated applicants. While he was on strike, another contractor at the Exxon site, J. E. Merit, hired him. Dame did not work for Merit, however. Merit was unable to get him an Exxon security badge because the Respondent refused to turn in the badge giving Dame access to its site. The badges are the property of Exxon; their purpose is to account for personnel in emergencies. Therefore, Exxon does not allow an employee to have more than one badge, and requires that all temporary absences, including transfers, leaves, suspensions, and strikes, be reported to Exxon security. Exxon would then determine whether the badge should be turned in.

The Respondent did not report Dame's absence to Exxon. Exxon security did not learn of it until J. E. Merit requested a badge for him. An Exxon security officer explained security and badge policies to the Respondent's administrative site manager, Joe Ferrer, including that Dame could not work for J. E. Merit unless Fluor Daniel returned his badge. Ferrer refused to release the badge. At trial, Ferrer testified that it was against company policy to release the badge of a current employee. We find that this is a pretext. We conclude that Ferrer disregarded Exxon security policies in order

³⁶ Even taking into account some inflation in this number because the Respondent included misspellings and minor differences in position name, the percentage of rule violations in this category is significant.

³⁷ The Respondent stipulated that Bamber is a supervisor.

³⁸ The Respondent stipulated that Robinson is a supervisor.

³⁹ See *Quality Control Electric*, 323 NLRB 238, 239 (1997).

to further its end of retaliating against Dame and find that the refusal to release the badge, which was the property of Exxon, violated Section 8(a)(3) and (1).

D. The Complaint's Allegations Regarding Rebar Helpers

The judge dismissed the complaint's allegations that the Respondent discriminatorily refused to consider and hire applicants for posted-rebar-helper positions. The General Counsel and the Charging Parties excepted.

Five members of Pipeliners Union Local 692 went to the Exxon hiring office on April 19 (the day Armstrong and Broussard applied) and applied for work in postedrebar-helper positions. Like the other discriminatees, all five were highly qualified and had substantial experience. None of the five was hired. Unlike the situation affecting the other discriminatees, no rebar-helper applicants were subsequently hired into the positions posted. Although two incumbent employees (nightshift laborers) were offered transfers into the higher paying-rebar helper positions in July, no outside hiring occurred. The General Counsel alleges that these internal transfers were camouflaged hires. We find, however, that in these circumstances, the evidence is insufficient to establish that the Respondent unlawfully refused to hire the unionrebar applicants. Accordingly, we find no merit in the exceptions insofar as they relate to the Respondent's alleged refusal to hire the five-rebar-helper applicants. However, as set forth at the conclusion of section V of this Decision and Order, we find that the Respondent unlawfully did refuse to consider these five applicants for hire to rebar-helper positions.

IV. HIRING AT PALO VERDE

As at Exxon, at Palo Verde the Respondent claims that it did not consider or hire the alleged discriminatees because they never applied when positions were open and, when positions were open, their applications had expired. The Palo Verde argument does not parallel that at Exxon in all respects, however, because as long-term Bechtel employees with highly specific craft experience and close familiarity with APS facilities and procedures, they were clearly qualified applicants. The Respondent does not contend to the contrary. Nevertheless, the Respondent hired none of them. We now consider the hiring practices that led to that result.

A. Alleged Discriminatees' Qualifications and Experience

The alleged discriminatees, all of whom had worked for Bechtel under a union collective-bargaining agreement, 40 submitted applications at Palo Verde during the 12-day period between June 16 and June 27, 1994. 41 All of them had worked at Palo Verde for many years in the same jobs for which they were applying. 42 The alleged discriminatees had all worked inside the reactor containment performing hazardous work that required superior training and skill. Refueling the reactor entailed removing the reactor head and disassembling the system, inspecting its components, repairing and reinsulating as needed, and reinstalling the entire system in reverse order. Maintenance entailed welding or replacing cracked, worn, or damaged parts and insulation materials in the reactor, the control rod assemblies and coolant pumps, the radiation waste tank system, the containment shell and penetration sleeves, and the fuel transfer tube, pool liner, and spent fuel storage racks, and in the attached steam generators and related equipment. 43

Because of the nuclear risk, all Palo Verde employees underwent background investigations and were assigned security clearances and escorted or independent (unescorted) status. Background checks for new employees took several weeks to complete. Update checks on employees returning for outages took less than a week. The alleged discriminatees had all achieved independent worker status and had high-level clearances that admitted them to the reactor containment, the control room and secondary alarm system, or the central alarm station.

APS operated its own training program through which Palo Verde employees, including the alleged discriminatees, regularly updated their skills and certifications and reviewed APS procedures for radiation protection and safety. APS kept computerized records on each employee detailing courses completed, licenses and certifications, independent status, and clearance level. These records were easily and readily available to the Respondent. The Respondent did not request them.

⁴⁰ The one exception was paid organizer Gary Evenson, who had never worked at Palo Verde but was a highly experienced boilermaker.

⁴¹ On June 16, 16 boilermakers, 2 ironworkers, and 1 insulator applied; on June 20, 12 millwrights, 1 ironworker, and 2 boilermakers; on June 21, 2 boilermakers; and on June 23, 9 millwrights, 3 ironworkers, 1 boilermaker, 2 insulators, and 1 electrician. On June 27, 26 others attempted to apply; these included 10 insulators, 3 boilermakers, 3 carpenters, 3 ironworkers, 2 millwrights, 2 cement masons, 1 sprinkler fitter, and 2 painters.

⁴² Some were applying for jobs they were still performing; the last Bechtel employee did not leave the facility until early July.

⁴³ The containment housed the entire system for converting nuclear energy into electrical power. This included, in addition to the reactor system, a massive overhead crane assembly, two steam generators, the pressurizer, and the condenser. A multi-ton missile shield protected the containment and its contents.

Contrary to its representations to APS when bidding on the project,44 the Respondent did not review the incumbent Bechtel work force for qualified employees nor make any effort to recruit from that source. The Respondent did recruit extensively from other sources, including individuals who had never worked for the Respondent, for the Palo Verde plant, or for any other nuclear facility. Of the 111 employees hired for the Respondent's base crew, 34 (nearly one-third) had no prior nuclear experience. Including the 52 alleged discriminatees who were allowed to apply, 200 former Bechtel employees submitted applications. Of these, the Respondent hired 91. None of the 91 Bechtel hires presented indicia of union activity beyond presumed membership inferred from their employment with Bechtel. Roughly a quarter of these were hired in utility classifications, the unskilled positions that the wage survey had said could be filled locally.⁴⁵

B. Failure to Consider or Hire the Alleged Discriminatees

As set forth in the illustrations that follow, the Respondent treated the alleged discriminatees differently from those whom it did not perceive to be union activists.

- 1. The first group of alleged discriminatees to arrive at the recruitment trailer applied for "boilermaker" positions. All other applicants applied for comparable work bearing different job titles, such as "equipment mechanic," "ironworker," "millwright," "pipefitter," "pipewelder," and "sheet metal." The Respondent claimed that it did not have a "boilermaker" classification. The Respondent allowed 22 alleged discriminatees to apply for this nonexistent classification; it then put those applications into a dead file designated for nonbudgeted positions.
- 2. About June 14, union boilermaker Mark Smith, without insignia, went to the Palo Verde trailer looking for work. He was told to return the following day to apply. When he returned, recruiter Wallace told him that the Respondent would need welders very soon. On June 16, Smith and Steve Horlacher applied with a group of voluntary union organizers, who displayed union insignia. None was hired. In mid-August, Smith and Horlacher applied again, without insignia, and were hired for the steam generator jump team. In addition to Smith and

Horlacher, the Respondent hired seven other mechanical craft employees for the jump team.

Recruiters told both Smith and Horlacher that the Respondent needed welders with nuclear experience. At that time, the alleged discriminatees' applications were active: the first 60-day period expired on August 17, the last on August 24. The Respondent did not contact any of them. On September 8, one of the Respondent's foremen, Harry Sinclair, explained to Horlacher that no alleged discriminatees had been hired because they had written "voluntary union organizer" on their applications. Sinclair's statement was alleged to violate Section 8(a)(1). We find that it did. 48

3. On June 27, a Monday, a final group of 26 alleged discriminatees arrived at the recruitment trailer and sought to apply. Recruiters turned them away, telling them that the Respondent was no longer accepting applications. That same day the Respondent accepted 55 applications from nonactivists. 49 Other nonactivist applicants were invited to check back with recruiters in case there were no-shows on June 27. Several did, submitted applications, and were hired. There were a total of 68 non-activist applications and hires subsequent to the Respondent's refusal to allow the June 27 discriminatees to apply.⁵⁰ At that time, all of the alleged discriminatees' applications were active. None of the alleged discriminatees was invited to check back in case of no-shows. To the contrary, a recruiter advised alleged discriminatee Hayes, a millwright, that no vacancies were expected in his craft in the next 60 days. That 60-day period—that is, mid to late summer—coincided with the time when numerous metal craft staff were traditionally hired in preparation for the September outage.

⁴⁴ See sec. 1A, supra.

⁴⁵ See infra.

⁴⁶ There was unrefuted testimony that Bechtel metal craft employees had worked on composite crews and that all crew members could perform all aspects of the work, even those that fell outside their own trade.

⁴⁷ Horlacher told recruiter Koza that Evenson could supply all the experienced welders that he needed and gave him Evenson's card. Koza never called Evenson.

⁴⁸ That Sinclair did not have hiring authority does not immunize his statements. See fn. 39, above.

⁴⁹ The judge found that recruiters turned away the alleged discriminatees on June 27, while accepting applications from nonactivists. The Respondent's position on exception is that the 55 persons who reported on June 27 were not applicants, as they had previously been given hiring commitments over the telephone. The implication is that all positions had been filled when the discriminatees arrived and that recruiters truthfully told them that the Respondent was not accepting applications. Even were that the case, it does not help the Respondent. It would simply add to the extensive list of instances where hiring rules were disparately applied in favor of nonactivists: the Respondent's craft hiring protocol both prohibits consideration of applicants prior to submission of applications and requires that applications must be submitted in person. If the June 27 reports had been hired before arrival, then the Respondent's statistics for persons hired before filing an application must be increased by 55.

⁵⁰ Of the 68 hires, almost none had 42 months of craft experience.

Roughly, half of all hires on June 27 were in carpenter classifications, numerous others in unskilled utility positions. Carpentry and unskilled labor were two of the three job categories that the Respondent's wage survey had said could safely be hired locally. Several metal trades personnel, both preferenced and off-the-street, were hired into nonmechanical classifications. Ten or more former employees were hired in crafts in which they had not been certified and had no experience. Many of the post-June 27 hires had no prior nuclear experience. Some of the nonpreferenced applicants had no relevant experience.

- 4. In mid-July, J.D. Howell, a welder, called Palo Verde to inquire about work, giving no indication of union membership.⁵³ He was told they would get back to him. Howell never heard from Palo Verde. Two months later a recruiter from the Respondent's Wolf Creek nuclear project in Kansas, where Howell had never applied, called to see if Howell was interested in working at Wolf Creek. At that time, Wolf Creek had a critical shortage of welders and was offering referral rewards of up to \$500. The Respondent stipulated at trial that the Wolf Creek plant had enough openings to hire all of the alleged Palo Verde discriminatees. None of the alleged discriminatees was referred to Wolf Creek.
- 5. Throughout the following year several events occurred that further underscored the Respondent's intention to avoid hiring the alleged discriminatees. For the January 1995 outage, the Respondent offered a per diem stipend of \$35 a day to metal and mechanical craft employees who traveled more than 100 miles to work at Palo Verde. That July, a Respondent agent told alleged discriminatee Mark Winham that the Respondent needed welders and that a recruiter would call him. Recruiter Dan Owen called Winham the next day, but when Winham disclosed that he was a voluntary union organizer, Owen told him that he did not need anyone. Later that year, the Respondent experienced persistent trouble staffing the Palo Verde facility with qualified people and had to send incumbent employees out for training to improve their skills. Monthly reports from August to December repeatedly referred to a shortage of welders, trouble meeting staffing needs, and problems with poor craft training and poor knowledge of APS procedures. Later, in January 1996, the Respondent implemented an im-

proved wage package at Palo Verde due to difficulty in obtaining employees to work there.

C. Deviations From the Hiring Protocol

There were 1261 craft applications at Palo Verde and 962 craft hires. The Respondent hired none of the 79 alleged discriminatees. There were 262 off-the-street applicants hired into the discriminatees' crafts, a hiring ratio of 27 percent. Of the 200 former Bechtel employees who were allowed to apply, the 52 alleged discriminatees represented 25 percent. The 91 former Bechtel employees who were hired came from the remaining 148 Bechtel applicants, a hiring ratio of 62 percent.

The Respondent's data, which reported nonpreferenced hires only through November 1, 1994, revealed 892 known deviations from the Respondent's hiring rules. Nine journeymen were hired before they applied. Two were hired after their applications had expired. There were 88 off-the-street journeyman hires with less than 42 months' craft experience. Over 700 applicants were considered for crafts other than those for which they applied. To those considered for other crafts, 53 were nonactivist former Bechtel employees (almost half of whom were hired on June 27). None of the former Bechtel "boilermaker" applicants was accorded this flexibility. Further, as at Exxon, significant percentages of applications contained more than one deviation.

V. CONCLUSIONS

We find that the foregoing evidence establishes that union animus motivated the Respondent's hiring decisions at its Exxon and Palo Verde projects. We reject the Respondent's claims that its hiring decisions and protocols were based on legitimate business considerations. Our rejection of these defenses is not based on any assessment that the Respondent's hiring procedures fail to conform with reasonable business practices. "Reasonableness" is not the standard by which the Board assesses an employer's hiring system. Absent an unlawful motive, an employer may, to paraphrase the axiom, reject an applicant for "a good reason, a bad reason, or no reason at all." However, as the Supreme Court long ago ruled in Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185-187 (1941), an employer may not discriminate against an applicant on the basis of union status.

⁵¹ Outage work was performed by metal trades personnel. One of the "carpenter" hires was a millwright. As noted in the previous paragraph, discriminatee Hayes was told that same day that there was no foreseeable need for millwrights.

⁵² Two of these wrote their original crafts on their applications, but crossed them out and substituted "carpenter."

⁵³ Howell never applied to Palo Verde and was not an alleged discriminatee.

 $^{^{54}}$ If the 55 applicants on June 27 are added, this number becomes 64. See fn. 49, above.

The Respondent reported considering 755 applicants for other crafts. Nevertheless, the same proviso as at Exxon applies, supra, fn. 36. We further reduce the number by the 22 "boilermaker" applicants. We accord no weight to the Respondent's inclusion of these applicants in the "considered for other crafts" category. We find that, as these applications were placed in a file for nonbudgeted positions, they were not considered for any category.

The Court explained in *Phelps Dodge* that discrimination in hiring on the basis of union status was one of the chief obstructions to collective bargaining through selforganization and that removal of such obstructions was a driving force behind the enactment of the National Labor Relations Act. 313 U.S. at 185. As the Court stated:

[The Act] leaves the adjustment of labor relations to the free play of economic forces but seeks to assure that the play of those forces be truly free. . . Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which is recognized as basic to the attainment of industrial peace.

313 U.S. at 183-185.

As summarized below, we find that the Respondent refused to consider and hire the discriminatees at Exxon and Palo Verde because of its unlawful antipathy to their union status. As the case turns on employer motive, burdens of proof are governed by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). With respect to the discriminatory refusal-to-hire allegations in particular, the Board recently held in *FES*, 331 NLRB No. 20 (2000), that the General Counsel must establish on the merits at the unfair labor practice hearing:

(1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

Id. at slip op. at 4 (footnotes omitted). Similarly, with respect to alleged discriminatory refusals to consider for hire, *FES* provides that it is the General Counsel's burden to establish:

(1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment.

Id. at slip op. at 7. Once these elements have been established, the burden shifts to the respondent to show that it would not have hired the applicants, or considered them for hire, even in the absence of their union activity or affiliation.

Under these standards, the General Counsel has clearly established his prima facie case. As determined by the judge, whose findings we adopt, the Respondent was hiring throughout the period when discriminatee applicants applied or unsuccessfully sought to apply for employment at the Exxon and Palo Verde sites. Next, those discriminatees were well qualified and experienced applicants for the positions they sought. Indeed, in the case of Palo Verde, the discriminatees were experienced at that very nuclear facility. Finally, as set forth below, the record is replete with evidence that antiunion animus factored heavily in the Respondent's decision not to hire the discriminatees, or, as to the applicants who unsuccessfully sought to apply at Palo Verde on June 27, contributed to the Respondent's decision not to consider them for hire or hire them.⁵⁷

Considerable evidence in this case supports the inference of unlawful motive. As set forth in the judge's decision, ⁵⁸ and expanded upon here, the Respondent committed prior unfair labor practices of the same type, harbored corporate level animus, made project level hiring decisions implementing its animus, and engaged in threatening and coercive conduct. Based on this evidence, we find that the Respondent engaged in a pattern of systematic discrimination intended to screen out union activists from consideration for employment. ⁵⁹ The practical effect of this was to allow the Respondent selec-

⁵⁶ Approved in NLRB v. Transportation Management. Corp., 462 U.S. 393 (1983).

⁵⁷ The amended complaint alleges that the Respondent both refused to consider and refused to hire the discriminatees who sought to apply on June 27.

⁵⁸ We do not, however, rely on every element of the judge's rationale. Thus, we do not rely on his findings that there was no hiring preference for salaried employees, that the Martinez memo was a blueprint for discrimination, that the Respondent did not hire any of the discriminatees during the pendency of the litigation, or his conclusion that participating in litigation evidenced continuing interest in employment. We also do not rely on the judge's findings concerning Hamrick's notations about Naccarato, Koza's failure to call Evenson for referrals, and the failure to produce Bueche's application.

⁵⁹ The Respondent asserts that the General Counsel has failed to meet its "heavy" burden of establishing systematic discrimination. The burden of establishing systematic discrimination is the same preponderance of the evidence standard that governs all *Wright Line* unlawful motive cases. See, e.g., *Norman King Electric*, 324 NLRB 1077, 1084–1086 (1977), enfd. 177 F.3d 430 (6th Cir. 1999); *Casey Electric*, 313 NLRB 774, 775 and fn. 2 (1994); *Ultrasystems Western Constructors*, 310 NLRB 545, 554–555 (1993), enf. denied on other grounds, 18 F.3d 251 (4th Cir. 1994); *D.S.E. Concrete Forms*, 303 NLRB 890, 898 (1991), enfd. 21 F.3d 1109 (5th Cir. 1994); and *KRI Constructors*, 290 NLRB 802, 811–813 (1988).

tively to choose a nonunion work force by precluding employment of union activists. ⁶⁰

There is abundant record evidence that the Respondent both harbored animus and acted upon it.⁶¹ The Respondent has a history of unfair labor practices premised on discriminatory implementation of the same hiring policies raised as defenses here. ⁶² High-ranking corporate officers expressed the view, well after the Supreme Court's Town & Country decision discredited that argument, 63 that union organizers cannot be loyal employees, and, indeed, may not even be bona fide employees.⁶⁴ This erroneous outlook is the acknowledged rationale for the Respondent's not granting its hiring preferences to Fluor Constructor employees or to its own direct-hire employees on union jobs. In tandem with its selective hiring preference, the Respondent maintains a national pool of former employees that it promotes to customers as a source of "loyal" labor. 65 Corporate antipathy to collective bargaining underlies key portions of the Palo Verde wage survey and the Palo Verde staffing plan⁶⁶ and is reflected in the unexplained and unauthorized decision at Exxon to change hiring policies by cutting the active application period in half.⁶⁷

It is significant that line managers at both the Exxon and Palo Verde projects, over 1000 miles apart, had a common understanding that the Respondent's hiring policies embodied antiunion objectives. Sinclair, at Palo Verde, admitted that voluntary union organizers would not be hired. Bamber, at Exxon, thought the hiring office had slipped up in allowing someone like Russell to get through. The Respondent's field management made these corporate attitudes clear to employees through co-

⁶⁰ See Norman King Electric, 324 NLRB at 1086.

ercive and discriminatory acts. In addition, three Respondent agents connected with this case—two corporate level managers and a recruiter—also played roles in *Fluor Daniel I* or *II*.⁶⁸

Staffing practices at both projects reflected the Respondent's corporate animus against union activist applicants. At Palo Verde, the Respondent failed to consider the obvious and natural source of qualified workers, the incumbent work force, and recruited from elsewhere in the country to avoid the risk of hiring organized craft employees.⁶⁹ Recruiters at both projects drew heavily on the national pool of former employees, even to the extent of hiring former employees with undesirable records.⁷⁰ The Respondent went to substantial effort and expense paying per diem to nonlocals, paying for advertising, sending mass recruitment mailgrams, and paying subcontractors—to avoid considering the qualified activist journeymen whose applications were still present in its office in "inactive files." At Exxon, the Respondent relied on untimeliness as a cardinal reason for its failure to consider union activists, though it could not explain its abrupt abridgment of the active application period.⁷²

The "inactive" concept, coupled with the rule against accepting applications unless there were present openings, is the central tenet of the Respondent's defense at both projects. This formula was repeatedly invoked to counter virtually every allegedly discriminatory anomaly in the hiring process. Thus, the Respondent asserts, it did not consider or hire the discriminatees, however qualified or experienced they may have been, because they never applied at the right time—that is, on each and every occasion that the Respondent filled positions in their crafts, their applications were inactive; or, as the Respondent conversely stated its position, discriminatees never applied when positions were available. The pretextual nature of this rationale is highlighted by the Respondent's conduct at Exxon. Until the discriminatees submitted their applications, Senior

68 See *Grand Rapids Press of Booth Newspapers*, 327 NLRB at 395 (repeated involvement by the same managers was evidence of animus).

⁷⁰ See *Starcon, Inc.*, 323 NLRB 977, 982 (1997), enfd. in pertinent part, 176 F.3d 948 (7th Cir. 1999) (respondent's hiring of former employees with undesirable work records while ignoring union applicants with facially impressive qualifications was indicative of animus).

⁶¹ We reject as unmeritorious the Respondent's exceptions contending it did not harbor union animus, and that, if it did, the General Coursel failed to establish a nexus between animus and hiring decisions.

⁶² Prior unfair labor practices directed at the same type of activity are evidence of continuing union animus toward that activity. *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 395 (1998).

⁶³ The Supreme Court, in *Town & Country Electric*, 516 U.S. 85 (1995), rejected the premise that an employee who is loyal to a union cannot be loyal to an employer.

⁶⁴ Charging Party Pipefitters excepted to the judge's failure to find that the Respondent extended its hiring priority only to former employees who worked for affiliates that did not have union contracts. Although this finding is encompassed in the judge's decision, to avoid misunderstanding, we expressly so find.

⁶⁵ The term "loyal" in the context of this case is a form of shorthand for "nonunion." Similarly, in these circumstances, we construe the concept of acceptable "philosophies," as it was used in the Respondent's Palo Verde staffing plan, sec. 1A, above, as a thinly disguised reference to the prospective employees' union sentiments.

⁶⁶ See sec. 1A, above.

⁶⁷ See *Custom Top Soil*, 327 NLRB 121, 125 (1998) (changing application policies to restrict applications by union members evidenced animus).

⁶⁹ See *U.S. Marine*, 293 NLRB 669, 671 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991) (en banc), cert. denied 503 U.S. 936 (1992) (pretextual reasons for successor's rejection of highly skilled, long-term plant employees with good work records evidenced unlawful motive).

⁷¹ See *KRI Constructors*, 290 NLRB at 813 (acting against financial interest concurrently with refusing to consider applicants with union backgrounds evidenced unlawful motive).

⁷² Where there is no justification for a policy, it may be inferred that the real reason is an unlawful one. *Richard Mellow Electrical Contractors*, 327 NLRB 1112, 1115 (1999) (absence of a business justification, coupled with animus, warranted inference respondent was motivated by a desire to avoid hiring union members).

submitted their applications, Senior Site Manager Austin had ignored the 30-day rule in favor of building up a reserve of qualified applicants. These reserve applicants are the same ones Austin later testified that he would not consider under any circumstance, even if it meant failing to hire adequate staff to meet the Respondent's contractual obligations to its client.

Hiring practices at both projects abounded with onesided exceptions and disparities. Discriminatees were given different information and different opportunities to apply from applicants who had no discernable union activist leanings.⁷³ The discriminatees were kept uninformed concerning vital hiring rules and threshold employment requirements, 74 yet were held to the strictest standards of compliance. 75 Although they submitted credentials that would have warranted inquiry—e.g., apprenticeships, other training, positions held, wage rate, years in trade, attached resumes⁷⁶—no discriminatee was interviewed or spoken to beyond perfunctory, and sometimes untruthful, statements.77 At the same time, applicants with weak or nonexistent union ties were courted, accommodated, and hired, even when they did not meet the Respondent's employment criteria.⁷⁸ As in Fluor Daniel I and II, we find that the Respondent offered "no credible reasons" for these clear disparities. We again conclude that it is "not mere coincidence" that voluntary union organizers were not hired, while applicants with

weak or nonexistent union ties were hired,⁷⁹ and that the Respondent's defenses are pretextual.

The Respondent argues that its hire of numerous employees whose applications reflected union affiliation, as well as of discriminatees Russell and Dame, negates any negative inference. We reject that assertion. It is well established that an employer's failure to discriminate against all applicants in a class is not a defense. 80 In addition, the Respondent's definition of union affiliation is so inclusive as to be meaningless. The Respondent counted as "union" those with slight or passive affiliations or whose union connections were in the distant past.⁸¹ Moreover, as the Board observed in Fluor Daniel II, there is a significant difference between past union affiliation and notice of present intent to organize.82 Where applicants who demonstrated such an intent were uniformly excluded from consideration, hiring persons with attenuated union links is inadequate to refute the inference of hostile motive.

The Respondent's exceptions raise another challenge to the sufficiency of the prima facie case. Relying on the decision of the United States Court of Appeals for the Sixth Circuit in *Fluor Daniel II*, ⁸³ the Respondent asserts that the General Counsel has failed to shift the burden of proof to the Respondent by failing to match each alleged discriminatee with an available job that he or she was qualified to perform. The Respondent's reliance on that decision is unavailing. In contrast to *Fluor Daniel II*, in the proceeding before us, the administrative law judge expressly considered job availability and made factual findings that vacancies existed that the discriminatees were qualified to fill, and, further, that over the life of both projects there were enough positions to have employed every discriminatee. ⁸⁴ This comports with the

⁷³ See, e.g., *Lancet Arch*, 324 NLRB 191, 193 (1997) (respondent treated applicants differently by refusing to provide applications to those with ostensible union affiliations); and *Clock Electric*, 323 NLRB 1226, 1231 (1997), enfd. in relevant part 162 F.3d 907 (6th Cir. 1998) (respondent demonstrated animus when it told union activists that it was not hiring at a time when the company was actively seeking to hire other journeymen).

⁷⁴ See *M.J. Mechanical Services*, 325 NLRB 1098, 1105 (1998) (employer operating without discriminatory motives is unlikely to conceal from applicants with directly related skills the means of having their applications considered).

⁷⁵ See *Monfort of Colorado*, 298 NLRB 73, 79–80 (1990), enfd. in relevant part, 965 F.2d 1538 (10th Cir. 1992).

⁷⁶ Fluor Daniel I, 304 NLRB at 970; see also Fluor Daniel II, 311 NLRB at 498.

⁷⁷ See *Fluor Daniel I*, 304 NLRB at 970, and *Norman King Electric*, 324 NLRB at 1085, for the proposition that the failure to communicate with qualified applicants with union affiliations constitutes evidence of unlawful motive; and fn. 25, supra, regarding the expectation of Respondent managers that recruiters would interview, question, or otherwise communicate with credible applicants.

⁷⁸ Rigid enforcement of hiring policies to exclude union applicants, coupled with lax enforcement to include nonunion applicants, has been found to evidence unlawful motive. See *M.J. Mechanical*, 325 NLRB at 1105 (respondent demonstrated on several occasions a willingness to ignore normal hiring procedures when it had a job applicant it desired); and *Monfort of Colorado, Inc.*, supra (at plant reopening, respondent disparately and more strictly adhered to hiring criteria to exclude preclosure unionized work force, while breaching criteria to favor new, nonunion applicants).

⁷⁹ Fluor Daniel II, 311 NLRB at 500; Fluor Daniel I, 304 NLRB at 970–971. See Richard Mellow Electrical Contractors, 327 NLRB at 1115. See generally U.S. Service Industries, 324 NLRB 834, 844 (1997) (not "coincidental" that all strikers were transferred to less desirable jobs while nonstrikers were retained in more attractive jobs).

⁸⁰ See *KRI Constructors, Inc.*, 290 NLRB at 812; and *Norman King Electric*, 324 NLRB at 1085 (mere seeking out of known union member applicants does not bely animus).

⁸¹ See *KRI Constructors, Inc.*, 290 NLRB at 813 (respondent considered "union" applicants who posed no threat to its open shop operation, such as supervisors, employees of a company that later went nonunion, employees of a company that had closed, etc.).

 $[\]frac{\$2}{311}$ NLRB at 500; see, in addition, *Clock Electric*, 323 NLRB at 1231.

^{83 161} F.3d 953 (6th Cir. 1998).

⁸⁴ Hiring documents and statistics in the record amply support the judge's findings that there were hundreds of jobs that needed to be filled at Palo Verde, and that the Respondent hired 962 craftsmen into these jobs between June 1994 and January 1996. Hiring documents and statistics similarly support his findings that the Respondent hired 2800 employees at Exxon between January and December 1994. Though not

test that the Board recently established in *FES*, supra. We note that the Respondent did not contend that there was insufficient work to employ the discriminatees. Rather, it relies on the defenses that we have found to be pretextual to explain its failure to consider or hire them.

Accordingly, we adopt the judge's decision that the Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully refusing to consider or to hire the union activists named in the order section of the judge's decision, and otherwise violated Section 8(a)(1) and (3) as the judge found, and we adopt the judge's recommended order as modified.

Finally, although we agree with the judge that the Respondent did not violate Section 8(a)(3) by refusing to hire the five union applicants for the rebar-helper position, 85 we find that the Respondent did unlawfully refuse to consider the five for hire in violation of Section 8(a)(3).

As previously discussed, under *FES*, supra, where the General Counsel alleges a "refusal to consider" violation, he bears the burden of establishing at the unfair labor practice hearing that the respondent excluded applicants from its hiring process, and that antiunion animus contributed to its decision not to consider the applicants for hire. Once these elements have been satisfied, the burden shifts to the respondent to demonstrate that it would not have considered the applicants even absent their union activity or affiliation. Here we find that the General Counsel has met its burden, and that the Respondent has not rebutted it.

Initially, we find that the "failure to consider" allegation properly is before us. The complaint alleged that the Respondent unlawfully refused to consider as well as hire the union members who tendered applications for the Respondent's posted-rebar-helper position. The judge resolved the refusal to hire allegation, finding that a violation had not been established. The judge did not separately address the refusal to consider allegation, and the General Counsel and Charging Party Pipefitters have excepted to the failure to find this violation.

Second, we find that the General Counsel has met its burden under *FES* of establishing that the Respondent unlawfully refused to consider the five union applicants for rebar helper positions. In this regard, we note that the

Respondent had posted openings for, and was accepting applications for rebar helpers when the five submitted applications on April 19, 1994. 86 Upon receipt of their applications, the Respondent did not consider them, but promptly pulled its posting for the rebar-helper position. Furthermore, the Respondent's withdrawal of the rebarhelper posting, and refusal to consider the five applicants, occurred in the climate of pervasive antiunion animus and widespread refusals-to-consider and hire other alleged discriminatees. Accordingly, we find that the General Counsel has amply met its burden of establishing a refusal to consider violation as to applicants Randy Strothers, Coleman Fee, Memphis Johnson, Johnny Durant, and Jerry Elkins. We also find that the Respondent has not established that it would not have considered the five applicants for hire even in the absence of their union membership and activity. The fact that the Respondent determined, only after receipt of these applications, to pull the posting and seek to promote current employees into this position, does not satisfy its burden.

AMENDED CONCLUSION OF LAW

Insert the following as a new Conclusion of Law 7 and renumber the subsequent paragraph accordingly:

"7. Respondent violated Section 8(a)(1) and (3) when it failed and refused to consider for hire Randy Strothers, Coleman Fee, Memphis Johnson, Johnny Durant, and Jerry Elkins because of their union affiliation."

ORDER

The National Labor Relations Board orders that the Respondent, Fluor Daniel, Inc., Wintersburg, Arizona, and Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Restraining or coercing employees or applicants for employment in the exercise of their rights by telling them that those applicants who write "voluntary union organizer" on their applications will not be hired.
- (b) Threatening employees with unspecified reprisals because they engage in protected concerted activity.
- (c) Discouraging employees from engaging in activities on behalf of a labor organization by refusing to consider or hire job applicants because they are members or supporters of unions, or because they indicate on their employment applications that they are voluntary union organizers.
- (d) In any other manner interfering with, restraining, or coercing employees or applicants for employment in the

all of the 2800 were craft employees, the Respondent never contended that there was not enough work at the project to hire the discriminatees. Rather it relied on its 30-day rule to claim that their applications were never open when the Respondent was hiring in their crafts. Cf. Norris Electric Corp., 324 NLRB 1178, fn. 1 (1997) (General Counsel failed to demonstrate that applications were filed during hiring stages, that the company hired any applicants at the critical time, or that the company declined to hire in order to avoid hiring the union applicants).

⁸⁵ See sec. 3,C, final paragraph of this Decision and Order.

⁸⁶ Based on these facts, Member Hurtgen finds that Respondent had a hiring process in effect at the time of those applications.

exercise of the rights guaranteed them by Section 7 of the Act.

- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer to the below listed individuals employment in the positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and any other rights and privileges.

Palo Verde Project (Applicants who filed their applications in June 1994)

Boilermakers	Millwrights	
John Allen	Peter Apostoles	
Chester Arthur	Melvin Boyd	
James Begay	Lee Braudt	
Gary Clark	Gary Brinlee	
William Deen	Albert Charter	
Francisco Diaz	Frank Cody	
Jerry Dillon	John Cooper	
Leslie Dixon	Joe Hammons	
Gary Evenson	Peter Kornmuller	
Wayne Fern	Lloyd Landers	
Michael Harvey	Jack Martyn	
Robert Logue	Michael McQuarrie	
Dan Mourney	William Miles	
Rudy Pariga	Wylie Miller	
Vern Price	William Oviedo	
William Quallis	John Spiller	
Ira Sexton	Roger Stone	
Gary Sly	Michael Swarthout	
Curtis Veich	Frank Troester	
Larry Voorhees	rry Voorhees Michael Valdez	
Ernie Wilden	Richardo Valdez	
Electricians	Ironworkers	
John Starkel	Tony Allen Sr.	
	Mel Brubaker	
Insulators	Jim Lehmann	
Michael Bradley	Lance Mendel	
Ed Martinez Martin Murphy		
Frank Naccarato	Floyd Smith	

Palo Verde Project

(Applicants denied opportunity to file applications on June 27, 1994)

Insulators	Carpenters
James Arias	Francis Chaney
Abondio Cabrera	Don Shoemaker
Robert Cabrera	Johnny Tyler Jr.
Curtis Case	

Sprinkler Fitter

James Cruill

William Howlier	John Rahn
Mark Kasdorf	
Dennis Moya	Ironworkers
Kelvin Patton	Linda Hayes
Jose Sanchez	Steve Padilla
	Ron Richards
Painters	Cement Masons
Julio Garcia	Waymond Parker
Greg Stroud	Charles Walsh
Boilermakers	Millwrights
Michael Goodman	Clyde Hafeli
Mike Leslie	Ken Hayes
Joseph Wood	

Palo Verde

(Applicant first told in August 1995 that Respondent needs welder and then told, after he says he is union and wants to organize, that Respondent does not need welders at that time)

Boilermaker Mark Winham

Exxon Project

Electricians	Pipefitters
Danny Aucoin	Jeff Armstrong
Ricky Achord	William Blalock
Joe Aycock	Eugene Braud
Chris Bonnette	Billy D. Breaud
Kelly Browning	Jeffrey Burns
Jeff Bourg	Ernest Ford
Curtis Blount	Jeff Mire
Edwin Cooks	Steven LeBlanc
Mike Clary	Terry Quatrevingt
Richard Fletcher	Mike Wooten
Kelly Gauthreaux	
Wallace Roland Goetzman	Boilermakers
Dan Guarino	James "Kenny"
Mike James	Bueche
Earl Long	David Greer
Robert LeJeune	Ed Hughes
Leon Parent	John Kelly
Ronnie Penny	J. J. Leveron
Ernest Perrault	C. A. Lewis
Steve Pritchard	Robert H. Redden
Dale Rispone	A. E. Ross

(b) Make the individuals listed in paragraph 2(a) above whole for any loss of pay and other benefits suffered by them as a result of the discrimination against them and make Charles Dame whole for any loss of pay and other benefits suffered by him as a result of Respondent's re-

Kendrick "Ricky" Russell

fusal to release his security badge to Exxon, backpay to be computed in compliance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

- (c) Permit the individuals listed in paragraph 2(a) above to be tested to be certified by the Respondent in the craft for which they were unlawfully denied employment.
- (d) Consider Randy Strothers, Coleman Fee, Memphis Johnson, Johnny Durant, and Jerry Elkins for future job openings in the rebar-helper position, in accord with nondiscriminatory criteria, and notify the Charging Party, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plumbers and Pipefitters Local Union No. 198, and the Regional Director for Region 15 of future openings in positions for which the discriminatees applied or substantially equivalent positions. If it is shown at a compliance stage of this proceeding that Respondent, but for the failure to consider Strothers, Fee, Johnson, Durant, and Elkins on April 19, 1994, would have selected any of them for any job openings arising after the beginning of the hearing on August 1, 1995, or for any job openings arising before the hearing that the General Counsel neither knew nor should have known had arisen, Respondent shall hire them for any such position and make them whole for any loses, in the manner set forth in the remedy section of the judge's decision, as modified.
- (e) Within 14 days from the date of this Order, notify Randy Strothers, Coleman Fee, Memphis Johnson, Johnny Durant, and Jerry Elkins in writing that any future job application will be considered in a nondiscriminatory way.
- (f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider or hire, and within 3 days thereafter notify the individuals listed in paragraphs 2(a) and 2(d) that this has been done and that the refusals to consider, and the refusal to consider and hire, will not be used against them in any way.
- (g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (h) Within 14 days after service by the Regions, post at all of its employment facilities and jobsites subject to the jurisdiction of the National Labor Relations Act copies of

the attached notice marked "Appendix."87 Copies of the notice, on forms provided by the Regional Directors for Region 15 and 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and applicants are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at anytime since March 31, 1994.

(i) Within 21 days after service by Regions 15 and 28, file with the Regional Directors a sworn certification of a responsible official on a form provided by the Regions attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection To choose not to engage in any of these protected concerted activities.

WE WILL NOT coerce employees or applicants for employment in the exercise of their rights by telling them that those applicants who write "voluntary union organizer" on their applications will not be hired.

WE WILL NOT threaten employees with unspecified reprisals because they engage in protected concerted activity.

⁸⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT discourage employees from engaging in activities on behalf of a labor organization by refusing to hire job applicants because they are members of or supporters of unions, or because they indicate on their employment applications that they are voluntary union organizers.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights protected by the Act.

WE WILL offer to the below listed individuals employment in positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges.

Palo Verde Project

Boilermakers Millwrights Peter Apostoles John Allen Melvin Bovd Chester Arthur James Begay Lee Braudt Gary Clark Gary Brinlee William Deen Albert Charter Francisco Diaz Frank Cody Jerry Dillon John Cooper Leslie Dixon Joe Hammons Gary Evenson Peter Kornmuller Wayne Fern Lloyd Landers Michael Harvey Jack Martvn Robert Logue Michael McOuarrie Dan Mourney William Miles Rudy Pariga Wylie Miller Vern Price William Oviedo William Quallis John Spiller Ira Sexton Roger Stone Michael Swarthout Gary Sly Curtis Veich Frank Troester Larry Voorhees Michael Valdez Ernie Wilden Richardo Valdez Electricians Ironworkers John Starkel Tony Allen Sr. Mel Brubaker Jim Lehmann Insulators Michael Bradley Lance Mendel **Ed Martinez** Martin Murphy Frank Naccarato Floyd Smith

Palo Verde Project

InsulatorsCarpentersJames AriasFrancis ChaneyAbondio CabreraDon ShoemakerRobert CabreraJohnny Tyler, Jr.Curtis Case

James Cruill Sprinkler Fitter John Rahn William Howlier Mark Kasdorf Dennis Moya Ironworkers Kelvin Patton Linda Haves Jose Sanchez Steve Padilla Ron Richards Cement Masons Painters Wavmond Parker Julio Garcia Charles Walsh Greg Stroud Boilermakers Millwrights Clyde Hafeli Michael Goodman Mike Leslie Ken Hayes Joseph Wood

Palo Verde

Boilermaker Mark Winham

Exxon Project

Electricians **Pipefitters** Danny Aucoin Jeff Armstrong Ricky Achord William Blalock Joe Avcock Eugene Braud Chris Bonnette Billy D. Breaud Jeffrey Burns Kelly Browning Jeff Bourg Ernest Ford Curtis Blount Jeff Mire **Edwin Cooks** Steven LeBlanc Mike Clary Terry Quatrevingt Richard Fletcher Mike Wooten

Kelly Gauthreaux

Wallace Roland Goetzman

Boilermakers

Dan Guarino James "Kenny" Mike James Bueche Earl Long David Greer Robert LeJeune Ed Hughes John Kelly Leon Parent Ronnie Penny J. J. Leveron Ernest Perrault C. A. Lewis Steve Pritchard Robert H. Redden Dale Rispone A. E. Ross

Kendrick "Ricky" Russell

WE WILL make the above listed applicants whole for any loss of pay and other benefits, with interest, and make whole Charles Dame for loss of pay and other benefits as a result of our unlawful refusal to release his security badge, with interest.

WE WILL permit the above listed individuals to be tested to be certified in the craft for which they were unlawfully denied employment.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider and hire the abovenamed discriminatees and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to consider and hire them for employment will not be used against them in any way.

WE WILL consider Randy Strothers, Coleman Fee, Memphis Johnson, Johnny Durant, and Jerry Elkins for future job openings in accord with nondiscriminatory criteria, and notify them, the Charging Party United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Plumbers and Pipefitters Local Union No. 198, and the Regional Director for Region 15 of future openings in positions for which the discriminatees applied or substantially equivalent positions. If it is shown at a compliance stage of this proceeding that, but for the failure to consider them, they would have been selected for any other openings, we shall hire them for any such position and make them whole, with interest, for any loss of interest and benefits.

WE WILL, within 14 days of the Board's Order, notify Randy Strothers, Coleman Fee, Memphis Johnson, Johnny Durant, and Jerry Elkins in writing that any future job application will be considered in a nondiscriminatory way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider for employment Randy Strothers, Coleman Fee, Memphis Johnson, Johnny Durant, and Jerry Elkins and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to consider them for employment will not be used against them in any way.

FLUOR DANIEL, INC.

Jerome Schmidt, Esq., and Jeffrey DeNio, Esq., for the General Counsel.

William S. Myers, Mark Keenan, and Lewis T. Smoak, Esqs. (Ogletree, Deakins, Nash, Smoak, & Stewart), of Atlanta, Georgia, for Respondent.

Michael J. Stapp and Charles R. Schwartz, Esqs. (Blake & Uhlig, P.A..), of Kansas City, Kansas, for the Charging Party Boilermakers.

Francis J. Martorana and Benjamin N. Davis, Esqs. (O'Donoghue & O'Donoghue), of Washington, D.C., for the Charging Party Pipefitters Local 198.

Kendrick Russell, Business Manager, of Baton Rouge, Louisiana, for the Charging Party IBEW Local 995.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. This consolidated case involves allegations of unfair labor practices against Fluor Daniel, Inc. (Respondent). Respondent is one of the largest, if not the largest, general contractors in the world. This case involves allegations of failure and refusals to hire over 100 union affiliated applicants for employment because of their union affiliation at two separate and distinct projects, i.e., the Palo Verde Nuclear Generating Station in Wintersburg, Arizona, where Respondent had a service and maintenance contract, and Exxon's refinery in Baton Rouge, Louisiana, where Respondent was rebuilding Exxon's East Coker plant after it was destroyed by fire.

The case began with the filing of charges against Respondent by the Boilermakers International Union, IBEW Local 995, and Pipefitters Local 198. The Boilermakers International Union filed its charge and two amended charges in Region 28 in Phoenix, Arizona. IBEW Local 995 and Pipefitters Local 198 filed charges and amended charges in Region 15 in New Orleans, Louisiana. Phoenix are considered to the charges and amended charges in Region 15 in New Orleans, Louisiana.

On April 17, 1995, the National Labor Relations Board, by the Regional Director for Region 28, issued an amended complaint and on March 29, 1995, the National Labor Relations Board, by the Regional Director for Region 15, issued an amended complaint. Both amended complaints allege that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

On April 12, 1995, the General Counsel in Washington, D.C., had ordered that the complaints issued against Respondent in Region 28 and Region 15 be consolidated for trial.

Respondent had previously filed answers to the two amended complaints in which it denied that it violated the Act in any way.

Fifty one days of hearings were held before me between August 1, 1995, and December 12, 1996. The hearings were held in Phoenix, Arizona, and Baton Rouge, Louisiana. Shortly after the hearing opened in Phoenix in August 1995, the Boilermakers International Union filed an additional charge with Region 28 in Phoenix, Arizona, which the charge led the Regional Director for Region 28 to issue a complaint which I ordered consolidated for trial with the two amended complaints previously consolidated by the General Counsel.³

The consolidated complaints will be referred to simply as the complaint. There are two other reported cases involving Respondent, i.e., *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), enfd. mem., 976 F.2d 744 (11th Cir. 1992), and *Fluor Daniel, Inc.*, 311 NLRB 498 (1993), enfd. in part and remanded in part 102 F.3d 818 (6th Cir. 1996). These two reported cases were referred to in this litigation as *Fluor Daniel I* and *Fluor Daniel II*, respectively. I was the administrative law judge who presided in *Fluor Daniel II*.

¹ Case 28–CA–12750.

² Cases 15-CA-12938, 15-CA-12723, 15-CA-12852, 15-CA-12936, 15-CA-12544, and 15-CA-12666.

³ Case 28–CA–13357.

Upon the entire record in this case, to include posthearing briefs submitted on August 14, 1997, by the General Counsel, Respondent, Charging Party Boilermakers, and Charging Party Pipefitters Local 198 and, upon my observation of the witnesses and their demeanor, I hereby make the following.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that it meets the Board's jurisdictional standards at its jobsites at the Palo Verde Nuclear Generating Station in Arizona and at Exxon's East Coker plant in Louisiana

Respondent further admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondent admits, and I find, that the Boilermakers International Union, IBEW Local 995, and Pipefitters Local 198 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

Fluor Corporation, which is listed on the New York Stock Exchange, is the holding company for three subsidiary companies. The three companies are Fluor Daniel, Inc. (Respondent), Fluor Constructors International, Inc., Fluor Constructors, and AT Masey. Respondent is an open shop constructor, i.e., its employees are not organized and Respondent operates without a union contract.

Fluor Constructors is the union side of Fluor Corporation's empire. It is relatively small compared to Fluor Corporation's nonunion or open shop side, i.e., the Respondent.

Fluor Corporation, the parent, started up in the early 1900's in southern California. It was engineering oriented and its construction work was done by Fluor Constructors, Inc., which became quite unionized and is now the union side of Fluor Corporation and is now known, not as Fluor Constructors, Inc., but as Fluor Constructors International, Inc.

Daniel Construction was a nonunion or open shop general construction contractor and Fluor Corporation purchased it in the late 1970's and created Fluor Daniel, Inc., Respondent herein, some years later.

Traditionally Respondent, like most construction contractors, would go from job to job, i.e., it finishes one job and moves on to the next one and hires, quite often, craftsmen who had worked for it on prior projects. The supervisors and superintendents on various projects over the years had followings, that is, craftsmen who worked for them in the past and these people were often hired on new projects.

As time passed and Respondent got bigger and bigger it decided to establish a craft certification program. In time the certification program evolved into a written test, or in the case of welders a hands on demonstration of ability, and an evaluation of job performance after a period of time, usually 30 days. If the employee received a high enough score on the written test or demonstration, if a welder, and a high enough rating on his

or her performance rating that person would become certified in a particular craft. It was also possible for a person to be certified in more than one craft.

In this case, we are dealing with allegations that Respondent unlawfully failed to consider for hire and unlawfully failed to hire applicants for employment because the applicants for employment were affiliated with a union.

Respondent can chose a number of different ways to staff a job or project, e.g., what it refers to as "construction management" where Respondent serves as a general contractor and subcontracts the work to subcontractors who may or may not be open shop. The labor posture chosen by Respondent for the two projects involved in this litigation was "self perform open shop," i.e., Respondent would hire the employees to staff the project and would remain unaffiliated with any union.

Respondent had a hiring priority which it applied nationwide (if not worldwide) and which it applied on the two projects involved in this litigation.

That hiring priority was as follows: Respondent would initially hire Fluor Daniel certified applicants, then applicants with Fluor Daniel experience, and lastly all others. This was the hiring priority at Palo Verde but it was slightly modified at the Exxon project where Respondent claimed it gave priority to Louisiana residents within each of the hiring priorities.

The rationale for this hiring priority is, of course, the not unreasonable desire of an employer to hire as its employees people who have worked for it in the past and proven themselves to be competent and reliable workers. On its face, such a hiring priority is not unlawful because it is discrimination on the basis of competence and reliability and not discrimination based on race, gender, religion, or union affiliation. In practice it may put long time union members at a disadvantage because there is probably a good chance that they worked for union contractors in the past and not for nonunion contractors such as Respondent and would, as a result, not be either Fluor Daniel certified or Fluor Daniel experienced. A person could not become certified unless first hired as an employee so if a person was never hired by Respondent they would never become Fluor Daniel certified.

Fluor Corporation is the holding company for both Fluor Daniel, Inc., Respondent, and Fluor Constructors, Fluor Corporation's union arm. Even though both Respondent and Fluor Constructors are under the umbrella of Fluor Corporation experience as an employee of Fluor Constructors, which is union, does *not* result in a job applicant for a job with Respondent getting any type of hiring preference whatsoever.

I do not find on the basis of the record before me that Respondent's hiring practice per se is violative of the Act.

However, the record as a whole developed over 51 days of hearings, the testimony of over 100 witnesses, and thousands of pages of exhibits clearly establishes that Respondent at both jobsites in this litigation discriminated unlawfully against applicants for employment because of their union affiliation.

I will address each of the two jobsites separately.

At the outset, I note that an employer violates Section 8(a)(1) and (3) of the Act when it discriminates against an employee with regard to his or her tenure of employment to discourage union support or otherwise interfere with protected concerted

activity. The Supreme Court has held that the Act protects applicants for employment as well as employees. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183 (1941). Accordingly, the refusal to consider an application for employment for reasons prohibited by the Act is a violation of Section 8(a)(3) of the Act. *Starcon, Inc.*, 323 NLRB 977 (1997); *D.S.E. Concrete Forms*, 303 NLRB 890, 896 fn. 3 (1991), enfd. 21 F.3d 1109 (5th Cir. 1994); and *Shawnee Industries*, 140 NLRB 1451, 1453 (1963).

In reaching the conclusions I reach, I have considered and applied the Board's landmark decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981) cert. denied, 455 U.S. 989 (1982), but have also been mindful of the Sixth Circuit decision in *Fluor Daniel II*, supra.

This case may be referred to as a "salting" case. "Salting" is the word used to describe a situation where union affiliated applicants for employment seek jobs with nonunion employers in order to organize the job or employer from within.

The Exxon project in Baton Rouge is a classic "salting" case but the situation at the Palo Verde Nuclear Generating Station in Arizona is a "salting" case with a wrinkle because with one exception (paid union organizer Gary Evenson) all the applicants for jobs at Palo Verde had worked at Palo Verde in the same jobs they were applying for with Respondent. They had worked for Bechtel Corporation which had the service and maintenance contract at Palo Verde before Respondent got it in June 1994.

The organizing effort of the Boilermakers is called their "Fight Back" program and the organizing effort of the electricians is called COMET. COMET, an acronym, stands for construction, organizing, membership, education, and training.

"Fight Back" and "Comet" both seek to organize nonunion contractors in order to secure better wages and benefits for union members on the theory that nonunion contractors will not be able to underbid union contractors because they pay less in wages and benefits if all contractors are organized and paying good wages and furnishing good benefits to their employees.

B. Palo Verde Nuclear Generating Station (Palo Verde), Wintersburg, Arizona

For many years Bechtel Corporation, which is a heavily unionized employer and one of the largest general contractors and engineering firms in the world, had a service and maintenance contract with Arizona Public Service covering the Palo Verde Nuclear Generating Station in Wintersburg, Arizona, which is some 55 miles or so or a 1-hour car ride from Phoenix.

In connection with its obligations under the contract Bechtel Corporation provided a core group of craftsmen who worked full time at Palo Verde and also provided large numbers of craftsmen for periodic power outages at Palo Verde where extensive service and maintenance work would be done.

In 1994, Arizona Public Service put out bids with respect to the renewal of the contract to provide the service and maintenance work provided up to then by Bechtel Corporation. Respondent underbid Bechtel Corporation and got the service and maintenance contract. It was a 3-year contract with work to commence in the summer of 1994. Between June 1994 and February 1996, Respondent had hired 962 people out of the 1281 who had applied to do the work required under the contract

During the time that Bechtel had the contract, craftsmen from the following unions worked for Bechtel at Palo Verde, i.e., Boilermakers Local 627, Millwright Local 1914, Electricians Local 640, Ironworkers Local 75, Asbestos and Insulators Local 73, Cement Masons Local 394, and Carpenters Local 408.

Ron Green, president of power for Respondent and the highest ranking corporate official to appear as a witness, testified that Respondent bid the job with Arizona Public Service believing it could do periodic power outages quicker than Bechtel and with less people but testified further that Respondent was not in any way critical of the work performed by the craftsmen who worked for Bechtel and, indeed, it was Respondent's desire formally expressed to Arizona Public Service to identify and hire those former employees of Bechtel who were outstanding workers.

It is with this backdrop that in June 1994, 52 union affiliated applicants for employment applied for work with Respondent but are *not* hired and an additional 26 union affiliated applicants for employment are not even given the opportunity to apply for employment.

The people who applied and those who tried to apply on June 27, 1994, but were not allowed to, all possessed skills that were needed by Respondent and applied for jobs which Respondent later hired literally hundreds of other applicants. With the sole exception of Boilermakers paid union organizer Gary Evenson, all of these 78 applicants had worked for Bechtel at Palo Verde and had previously secured the high security clearances necessary to work at a nuclear power plant and had taken numerous courses and received extensive training from Arizona Public Service which was necessary in order to competently perform the important and sometimes highly dangerous work needed at a nuclear facility.

As noted earlier from the time Respondent took over the service and maintenance contract from Bechtel in June 1994 until February 1996, Respondent hired 962 out of the 1281 applicants for employment at Palo Verde and, indeed, hired fully 300 people in January 1995 for the first major power outage.

In early June 1994, representatives of the construction trade unions met in Phoenix and decided to undertake the task of having union affiliated applicants for employment apply to work for Respondent at Palo Verde. Essentially the representatives of various unions would call their members who were former Bechtel workers and had actually worked at Palo Verde and inquire if they wanted to apply for work. The union official in charge of this effort was Gary Evenson, a highly qualified boilermaker and full-time paid union organizer for the Boilermakers International Union.

On several days in June 1994, groups of craftsmen would meet at the Boilermakers union hall in Phoenix where Evenson would ask if they wanted to apply for work with Respondent at Palo Verde and would indeed accept employment if offered. They were instructed to write "voluntary union organizer," or words to that effect, on their applications and not to bother applying for work unless they were interested in taking the job.

doing a good job for Respondent, and willing to try to organize Respondent.

I find that the applicants were bona fide applicants for employment. See, e.g., Town & Country Electri,, 516 U.S. 85 (1995). I note that they were applying for work at a site where they had worked before and they lived in the general area of Palo Verde, namely, Phoenix and its suburbs.

On each of several days in June 1994, a group would then leave Phoenix after receiving Evenson's orientation and meet up again at a grocery store called the Red Quail near the Palo Verde site and then proceed as a group to Respondent's trailer where they would apply or try to apply for work.

On June 16, 1994, the first group of 19 men went to Respondent's trailer. Rather than all go in at once Gary Evenson and Mark Smith entered first and were given applications to fill out. Interestingly enough Mark Smith, a boilermaker, had been told on June 14, 1994, to come back the next day to apply. He did and was told by a representative of Respondent, Leonard Wallace, that Respondent was going to need welders and soon. Boilermakers do welding work. Smith had given no indication that he was union affiliated on June 14 and 15, 1994. Evenson and Smith, likewise, were not manifesting in any way that they were union affiliated on June 16, 1994. They filled out their applications and a short while later the rest of the group entered. All were wearing union buttons and hats and Evenson and Smith then displayed union buttons and hats. The rest of the group were allowed to fill out applications. It is clear Respondent knew the applicants were union-affiliated.

They were as follows:

Boilermakers

1. Chester Arthur 9. Vern Price 2. William Deen 10. William Quallis 3. Francisco Diaz 11. Curtis Veich 4. Jerry Dillon 12. Larry Voorhees 5. Wayne Fern 13. Ernie Wilden 6. Michael Harvey 14 Leslie Dixon 7. Robert Logue 15. Ira Sexton 8. Don Mourney 16. Gary Evenson

Ironworkers

Insulator

1. Jim Lehmann

1. Frank Naccarato

2. Martin Murphy

All filled out applications. None were hired. All except Gary Evenson, he had worked for Bechtel at Palo Verde and had secured high security clearances and received extensive training given by Arizona Public Service. Evenson, a highly experienced boilermaker with 35,000 hours of experience, had not previously been employed by Respondent. Each application on its face said it was good for 60 days.

On June 20, 1994, a second group of union affiliated applicants consisting of 15 men went to Respondent's trailer and filled out applications. They were as follows:

Millwrights

 Peter Apostoles 	Lloyd Landers
2. Melvin Boyd	8. Michael McQuarrie
3. Frank Cody	9. Wylie Miller
4. John Cooper	10. Roger Stone

5. Joe Hammons 11. Frank Troester 6. Peter Kornmuller 12. Michael Valdez Ironworker Boilermakers 1. Lance Mendel 1. Gary Clark 2. Rudy Pariga

All of the men who applied on June 20, 1994, had worked for Bechtel at Palo Verde, had security clearances, and had received extensive training from Arizona Public Service. None were hired

On June 21, 1994, two union affiliated men applied at Respondent's trailer for work. They were as follows:

Boilermakers

- 1. John Allen
- 2. Gary Sly

Again these applicants had worked for Bechtel at Palo Verde, had high security clearances, and had received extensive training from Arizona Public Service. They were never offered employment.

On June 23, 1994, a group of 16 union affiliated men applied at Respondent's trailer for work. They were as follows:

Millwrights	Ironworkers
 Lee Braudt 	1. Tony Allen, Sr.
Gary Brinlee	Mel Brubaker
3. Albert Charter	Floyd Smith
Jack Martyn	-
5. William Miles, Jr.	Boilermaker
William Oviedo	 James Begay
John Spiller	
8. Michael Swarthout	Insulators

9. Richard Valdez 1. Michael Bradley

2. Ed Martinez

Electrician

1. John Starkel

Again all these applicants had worked for Bechtel at Palo Verde, had high security clearances, and had received extensive training from Arizona Public Service. They were never offered employment.

The applications of all of the above 52 union affiliated applicants had a statement on the application which stated the application form would expire in 60 days after they were submitted or for these applicants in mid to late August 1994.

The applications submitted by the above 52 applicants for employment for the most part indicated on the face of the applications that the applicants were "Voluntary Union Organizers" and, in any event, it was crystal clear to Respondent's representatives who accepted the applicants that these applicants were union affiliated. Respondent does not contend that it did not know that these applicants were affiliated with a union. Again, none were offered employment.

Most of the above 52 discriminatees testified and for the few who did not we have their applications in evidence. All those who testified were exceedingly truthful and all 52, without exception, were qualified to work at Palo Verde. Literally hundreds of people were later hired by Respondent to do work these union affiliated applicants wanted to do and were exceedingly well qualified to do. And even with Respondent's hiring preference fully 45 percent of the craftsmen hired at Palo Verde had no prior experience with Respondent.

On June 27, 1994, a group of approximately 26 union affiliated applicants arrived at Respondent's trailer to apply for work. They were as follows:

7		
Insul	ato	rs

- 1. James Arias
- 2. Abondio Cabrera
- 3. Robert Cabrera
- 4. Curtis Case
- 4. Curus Case
- 5. James Cruill
- 6. William Howlier
- 7. Mark Kasdorf
- 8. Dennis Moya
- 9. Kelvin Patton
- 10. Jose Sanchez

Boilermakers

- 1. Michael Goodman
- 2. Mike Leslie
- 3. Joseph Wood

Carpenters

Carpenters

- 1. Francis Chaney
- 2. Don Shoemaker
- 3. Johnny Tyler, Jr.

Ironworkers

- 1. Linda Hayes
- 2. Steven Padilla
- 3. Ron Richards

Millwrights

- 1. Clyde Hafeli
- 2. Ken Hayes

Cement Masons

- 1. Waymond Parker
- 2. Charles Walsh

Sprinkler Fitter

1. John Rahn

Painters

- 1. Greg Stroud
- 2. Julio Garcia
- June 27, 1994, was a Monday and the group of applicants, who had all worked for Bechtel at Palo Verde and had security clearances and extensive training were told by Dean Hamrick, a supervisor for Respondent, that Respondent was *not* accepting applications. They left.

A charge was filed over the failure and refusal of Respondent to consider these applicants for employment and Respondent responded to the charge with a position letter which inaccurately stated that Respondent had accepted no applications between June 24 and June 28, 1994.

With respect to what occurred on June 27, 1994, Respondent clearly violated Section 8(a)(1) and (3) of the Act by refusing to consider for employment the union affiliated applicants. Hamrick admits that he knew that the persons who sought to apply for jobs on June 27, 1994, and were led by Gary Evenson were union people. Respondent never told anyone in the group to come back the next day and apply and most significantly Respondent was accepting applications on June 27, 1994. Indeed, no less than 55 people submitted applications on June 27, 1994, and were hired and Respondent accepted five more applications on June 28, 1994, and hired the applicants and eight applications on June 29, 1994, and hired the applicants. Most of these applicants who were hired were former employees of Respondent but not all of them.

Going to Respondent's trailer was not like going next door or across town to file an application where it would be fairly easy to come back the next day. Respondent's trailer, where it accepted applications, was out in the desert some 55 miles from Phoenix. With respect to boilermaker Joseph Wood, I note that a week or so earlier he had asked his mother, who worked for Arizona Public Service at Palo Verde, to get him an application to apply for work for Respondent. She did. He filled it out and gave it to his mother to turn in. Wood's mother, Catherine Ray, who testified before me, handed in the application at Respondent's trailer to a young woman prior to June 27, 1994. On the application Wood had written that he was a "voluntary union organizer." Not only was Wood never called but Respondent claims it did not even have his application as having been received.

All 26 of the people who tried to apply for work with Respondent on June 27, 1994, had worked for Bechtel at Palo Verde and had skills actually needed by Respondent at Palo Verde and other people were hired in their place to do what they were qualified to do and what they had actually done at that very site while working for Bechtel.

Most of the 26 would be applicants testified and impressed me as highly credible and competent craftsmen.

On July 28, 1995, a little more than a year after Respondent began its operations under the service and maintenance contract at Palo Verde union boilermaker Mark Winham, who had worked for Bechtel at Palo Verde, called Respondent's office to seek employment. He asked to speak to Mike Owen, who Gary Evenson had told him was doing the hiring. A woman who answered Respondent's phone said Mike Owen was busy at the moment but told Winham that Respondent was looking for welders, which is the type of work performed by boilermakers. Owen was a craft recruiter at the time for Respondent.

Later that very day Mark Winham spoke on the phone with Mike Owen and after Winham told Owen that he was a *union* boilermaker, had worked at Palo Verde before, and wanted to hire on and organize a little bit for the union, Owen tells Winham that Respondent really did not need anyone right then but that Winham should give Owen his name and he will call him when they need welders. Needless to say Owen never called Winham.

Curiously enough Danny Garnica had spoken with Mike Owen just the day before and Owen told boilermaker Garnica, who did *not* identify himself as union affiliated, to come out and fill out an application for a welder position. Owen admits he did not know Garnica was with the Union.

In other words, Owen, not knowing Garnica is union affiliated, says to him over the phone to come out and fill out an application for a welder position but tells Winham, who tells Owen he *is* union affiliated, that Respondent doesn't need welders right then and not to come out and apply even though a woman in Respondent's office earlier that very day had told Winham that Respondent needed welders. Both Garnica and Winham are welders. Welders are thereafter hired. Respondent violated Section 8(a)(1) and (3) of the Act when it failed to consider for hire and failed to hire Mark Winham.

The charge in the Winham matter was filed on October 4, 1995, and a complaint in that case, Case 28–CA–13357, issued on November 29, 1995, and was, as noted above, consolidated with the instant case.

The trial of the instant case began on August 1, 1995, and Respondent was well aware that the June 1994 applicants for employment were alleging that they had been discriminatorily denied employment and yet Respondent *never* contacted them about job openings.

I find that the people who applied for work with Respondent on June 16, 20, 21, 23, and the people who tried to apply for work with Respondent on June 27, 1994, but were not allowed to were all good-faith applicants for employment. With the exception of Gary Evenson, the Boilermaker's paid union organizer, all had formerly worked for Respondent's predecessor, Bechtel Corporation, at Palo Verde. There is nothing to suggest that they were anything but good-faith applicants for employment and are therefore entitled to the protection of the Act.

The next inquiry must be whether there were jobs that were to be filled. In other words it cannot be a violation of the law to fail to hire someone if in fact there was no opening to be filled.

In this case there were hundreds of jobs that were needed to be filled and were later filled by Respondent for which these union affiliated applicants were qualified.

At least as of the time the hearing before me closed on December 12, 1996, Respondent was hiring for periodic power outages which required work to be done which is the same work the union affiliated applicants did for Bechtel and which had to be done by Respondent. From the time Respondent began hiring craftsmen at Palo Verde in June 1994 until February 1996, Respondent had hired 962 craftsmen. There were more than enough jobs for all the discriminatees to be hired into their craft.

From June 16, 1994, until the present, Respondent has known these applicants wanted jobs. They knew it from the applications filed in June 1994 and they knew it because of charges and amended charges being filed on September 19 and October 27, 1994, and January 12, 1995, and they knew because of the amended complaint which issued on April 17, 1995, and they knew it from the hearing before me which began on August 1, 1995, and yet no offers of jobs have been made to these union affiliated applicants for employment. Respondent claims that it has a policy that applications remain active for 60 days but, according to Respondent, the 60-day active period rule is because after 60 days most craftsmen have found work and are no longer interested in working for Respondent but in this litigation we know the applicants were still interested in working for Respondent and Respondent knew it as well.

There is also no question about the fact that Respondent knew these applicants were union affiliated.

I find that these union affiliated applicants for employment were denied hire because of their union affiliation.

The record contains massive amounts of evidence which demonstrate antiunion animus on Respondent's part. The evidence of animus which supports the conclusion that Respondent discriminated in hiring against these union affiliated applicants for employment is as follows.

1. Prior to beginning work at Palo Verde, Respondent, in May 1993 conducted a wage survey. Respondent determined to staff the job on a "direct hire open shop" basis, i.e., Respondent would directly hire applicants for employment but it noted in the wage survey what it referred to as a "risk." The greatest risk Respondent warned of was that they may pick up union craft workers primarily in the mechanical trades. (See C.P.

- Exh. 93.) Respondent concedes in its brief at p. 160 that "this risk was noted because it posed a potential threat to Respondent's preferred means of performing the project open-shop, as union members could conceivably seek union representation and ultimately, a collective bargaining agreement." This coupled with all the other evidence establishes by at least a preponderance of the evidence that Respondent discriminated in hiring against the union affiliated applicants for employment in this case. Respondent's argument that this did not impact on actual hiring decisions is ludicrous.
- 2. There is no hiring preference for salaried personnel (engineers, etc.) who have worked in the past for Respondent but there is a hiring preference for craftsmen. The rationale for a preference should be that these folks worked for us in the past and were good workers so lets hire them over someone who never worked for us. This rationale should apply to salaried engineers as well as craftsmen but since engineers are not unionized and craftsmen may be it raises a question about Respondent's motive for having a hiring preference.
- 3. Fluor Corporation is the parent corporation for Respondent (Fluor Daniel, Inc.) and its union counterpart (Fluor Constructors) and yet while there is a hiring preference if someone has experience with Respondent (Fluor Daniel, Inc.) there is no hiring preference if the person worked for Fluor Corporation's union counterpart. The inference seems clear, i.e., Respondent doesn't want to hire union craftsmen.
- 4. On June 14, 1994, union boilermaker Mark Smith, went to Respondent's trailer at Palo Verde where people applied for work and said he wanted to apply. He was told by a representative of Respondent to come back the next day. Smith returned the next day and submitted an application. The representative of Respondent was craft recruiter Leonard Wallace who told Smith that Respondent would need welders soon. Wallace did not testify. However, Dean Hamrick, also a craft recruiter for Respondent, testified in Respondent's case that he told Gary Evenson, when Evenson and other union boilermakers went to apply on June 16, 1994, that Respondent was *not* hiring any boilermakers. Evenson and boilermaker applicants Leslie Dixon, Ernest Wilden, Michael Harvey, and Chester Arthur all credibly testified in rebuttal that no one representing Respondent said Respondent was *not* hiring boilermakers.
- 5. At the time that union insulator Frank Naccarato applied for work with Respondent on June 16, 1994, Respondent needed insulators. A notation was prepared by craft recruiter Dean Hamrick dated June 22, 1994, in his diary which was to remind him to ask recruiter Jim Hanna whether Naccarato should be hired because he was "non-Fluor Daniel." Written in the diary was the word "no." Hamrick testified that he answered his own inquiry and did not speak to Hanna about Naccarato and was really inquiring about whether there was a requirement to hire applicants who identified themselves as voluntary union organizers. This is utter nonsense. Hamrick had been in human resources work for Respondent since 1982. Hamrick knew full well there was no legal obligation to hire voluntary union organizers. It appears to me that Hamrick was tempted to hire Naccarato but wanted to check if it was okay because Naccarato was union and Hamrick found out that he should not hire him because of Naccarato's union affiliation.

- 6. On August 16, 1994, union boilermaker Steve Horlacher called out to Respondent and was told Respondent was looking for welders. This means that Respondent was ignoring the applications it had on file from the union applicants which were submitted in mid-June 1994. Horlacher was hired. He did *not* note on his application that he was a voluntary union organizer and he was hired whereas those union applicants who had made known their intent to exercise their federally guaranteed right to organize were *not* hired.
- 7. Steve Horlacher filed two applications with Respondent. On June 16, 1994, there was indicia of union affiliation on his application. He was *not* hired. On August 16, 1994, there was *no* indicia of union affiliation on his application and he *was* hired.
- 8. Millard "JD" Howell is a boilermaker union organizer. He is not an alleged discriminatee in this case. On July 14, 1994, Howell called Respondent's office at Palo Verde and spoke with a women he thought identified herself as Sue. He asked if Respondent was looking for welders. She told Howell to give her his name and telephone number and she would get back to him. Howell had told her he had worked for several different companies, all of which were nonunion. Howell left his mother's telephone number in Mississippi with the woman in Respondent's office at Palo Verde.

On September 12, 1994, Howell's wife told him that a woman named Marilyn had called Howell's mother and left a telephone number for him to call.

Howell called Marilyn on the telephone number given him. Marilyn, it turned out, worked for Respondent at the Wolf Creek Nuclear Station in Kansas.

Marilyn told Howell that Respondent was looking for welders and hands at Wolf Creek and Howell told her that he and another person would show up for work at Wolf Creek.

Howell went to Wolf Creek with another union boilermaker named James "Jay" Bragan. Both men were hired. On their applications at Wolf Creek Howell wrote that he was a "voluntary union organizer" and Bragan wrote that he was a "paid union organizer." Bragan testified and corroborated Howell.

The need for welders at Wolf Creek was so great that a memo was circulated among the employees at Wolf Creek that they would get a \$200 reward if they recommended a welder for employment who passed the welding test and was hired and they would be paid a \$300 reward if they recommended a welder who passed the test, was hired, and stayed until there was a general layoff.

This evidence is significant because Respondent never told the union applicants at Palo Verde anything about job opportunities at Wolf Creek but did get back to Howell about the opportunity for work at Wolf Creek after Howell had called Palo Verde and given a work history with *only* nonunion contractors.

9. With regard to the Wolf Creek Nuclear facility where Millard "JD" Howell and James "Jay" Bragan were hired, it should be noted that Respondent did *not* tell any of the union affiliated applicants for employment at Palo Verde about jobs at Wolf Creek and it was stipulated in the hearing before me that there were enough job openings at Wolf Creek to hire every single one of the discriminatees in the Palo Verde portion of this litigation.

10. On September 8, 1994, union boilermaker Steve Horlacher was with Foreman Harry Sinclair after work in a bar called Boondocks. The craftsmen at this time were working very hard with large amounts of overtime and, according to Horlacher, he asked Sinclair why Respondent did not hire more of the boilermakers and other qualified crafts people who had put their applicants in. According to Horlacher, Sinclair "said that his supervisor told him that the reason why is because they put voluntary union organizer across their applications." (Tr. 292.) Horlacher said, "Harry isn't that discrimination?" and Sinclair just shrugged. (Tr. 291–393.)

Sinclair was admitted by Respondent to be an agent and supervisor of Respondent within the meaning of the Act.

Sinclair who testified before me said he was not in Respondent's employ at the time he testified before me but wants to work for Respondent in the future. Sinclair denied he said to Horlacher what Horlacher claims he said. Arguably both Horlacher and Sinclair have motives to testify as they did. I observed the demeanor of both men and I found Horlacher to be the more credible. Needless to say the statement by a foreman that Respondent won't hire applicants who write "voluntary union organizer" on their job applications is a violation of Section 8(a)(1) as well as evidence that Respondent violated Section 8(a)(3) in its failure to hire the union affiliated applicants for employment.

- 11. Although the former Bechtel employees for the most part lived in the Phoenix area and could commute to Palo Verde, Respondent had to incur more cost by paying per diem to out-of-state craftsmen to work at Palo Verde. In order to avoid hiring these union affiliated applicants Respondent was willing to incur the extra expense of per diem.
- 12. On August 18, 1994, Don Koza, a craft recruiter for Respondent, told union boilermaker Steve Horlacher that Respondent needed jumpers and welders. Horlacher knew that this was the kind of work that union boilermakers did and he gave Koza the phone number of Gary Evenson to call to get referrals of people who could do the work Koza told Horlacher Respondent needed people to do. Koza never called Evenson.
- 13. Even though we were in trial on Respondent's alleged failure to hire union applicants who applied in June 1994 Charging Party Exhibits 27, 28, and 29, i.e., Respondent's memos of September 5, November 16, and December 5, 1995, reflect that Respondent was short on welders and fitters and was having trouble meeting its staffing needs at Palo Verde. And yet even though we were actually in trial on this case in September, November, and December 1995, Respondent took no action whatsoever to hire the union affiliated applicants in this litigation.

C. Exxon Project, Baton Rouge, Louisiana

Exxon operates a refinery in Baton Rouge, Louisiana. In October 1993 the East Coker plant at that refinery burned to the ground.

Respondent bid for, and was awarded the contract from Exxon to rebuild the East Coker plant. Work was scheduled to begin in January 1994 and be completed by July 1994. It was anticipated by Respondent that 250 people would be needed to rebuild the East Coker plant at a cost of \$50 million but Re-

spondent wound up needing 2800 people to do the job and it was not completed until December 1994 at a cost of approximately \$100 million.

The construction trade unions in Baton Rouge decided to encourage their members to seek employment with Respondent so that they could get work for their members and try to organize this large open shop contractor.

The applicants who sought employment with Respondent were members of several different unions, i.e., IBEW Local 995, Boilermaker Local 582, Pipefitters Local 198, and Laborers Local 692. Where appropriate I will refer to the applicants as highly qualified based on the material contained in their applications in the record. The union affiliated applicants hereafter listed wore union insignia, were in a group and it is uncontested that Respondent's hiring officials knew they were union applicants.

On January 19, 1994, 10 members of IBEW Local 995 applied for employment as electricians. Respondent had a sign posted in front of its hiring office proclaiming that Respondent was hiring electricians. The applicants were as follows:

1. Edwin Cooks

- 6. Robert LeJeune
- 2. Kelly Gauthreaux
- 7. Ronnie Penny
- 3. Roland Goetzman
- 8. Ernest Perrault
- 4. Don Guarino
- 9. Steve Pritchard
- 5. Mike James
- 10. Kendrick "Ricky" Russell

None of these highly trained electricians, eight of whom testified, were offered employment until late August 1994 when Ricky Russell and only Ricky Russell was offered a job. More on Russell later.

On January 25, 1994, four members of IBEW Local 995 applied for work. They were as follows:

- 1. Joe Avcock
- 2. Chris Bonnette
- 3. Jeff Bourg
- 4. Richard Fletcher

None of these highly qualified electricians, two of whom testified, were hired.

On January 26, 1994, five more highly qualified electricians applied for work. They were as follows:

- 1. Ricky Achord
- 2. Curtis Blount
- 3. Earl Long
- 4. Leon Parent
- 5. Dale Rispone

None of the five, there of whom testified, were hired.

On February 1, 1994, 15 men applied for work with Respondent. Seven of them were members of Pipefitters Local 198 and eight of them were members of Boilermakers Local 582. Respondent was hiring ironworkers and had posted a notice that it was hiring ironworkers. The uncontradicted testimony of numerous highly skilled craftsmen proved that pipefitters, ironworkers, and boilermakers could all do the work of ironworkers

The applicants were as follows:

Pipefitters

- 1. Jeff Armstrong
- 2. William Blalock
- 3. Eugene Braud
- 4. Billy D. Braid
- 5. Jeffrey Burns
- 6. Earnest Ford (who most likely applied on February 2, 1994)
- 7. Jeff Mire

Boilermakers

- 1. James K. Bueche
- 2. David Greer
- 3. Ed Hughes
- 4. John Kelly
- 5. JJ Leveron
- 6. C.A. Lewis
- 7. Robert H. Redden
- 8. A.E. Ross

None of these highly qualified applicants, 12 of whom testified, were hired.

Interestingly enough Respondent could not locate the application of boilermaker James "Kenny" Bueche. This is most interesting because Respondent claims that it did not discriminate against union affiliated applicants but simply applied its hiring preference, i.e., it would hire Fluor Daniel certified craftsmen first and then craftsmen with Fluor Daniel experience over all others. James "Kenny" Bueche had worked for Respondent in the past and was Fluor Daniel experienced and Respondent not only did not hire him but claimed it did not even have his application.

Respondent claims it did not have an application for Pipefitter Earnest Ford and the evidence further reflects that Ford probably applied on February 2, 1994, and was not with the other union applicants on February 1, 1994.

On April 19, 1994, one union pipefitter, Donald Broussard, and five union laborers applied for jobs. The laborers were as follows:

- 1. Randy Strothers
- 2. Coleman Fee
- 3. Memphis Johnson
- 4. Johnny Durant
- 5. Jerry Elkins

I will dismiss the allegations regarding these six discriminatees. The five union laborers all applied for the position of rebar helper which was posted. However, Respondent did not in fact hire any rebar helpers for this project after April 15, 1994, although Respondent did sometime later transfer two utility workers from utility worker to rebar helper positions. Supervisor Ed Strickland testified that the rebar work was properly accomplished. With respect to Donald Broussard I note that he is a young man whose application reflected no work at all in his trade for the past 2 years preceding his application. Based on his application Brossard does not appear qualified and Respondent's failure to hire him is not a violation of the Act.

On May 10, 1994, four union pipefitters applied for work for Respondent. They were as follows:

- 1. Steven LeBlanc
- 2. Terry Quatrevinght
- 3. Mike Wooten
- 4. Jeff Armstrong

These men applied because Jeff Armstrong had learned that Respondent was testing for pipefitters and he and the others went to Respondent's office to be tested as pipefitters and apply for work. They were not allowed to apply and were told that only former employees of Respondent could be tested.

In late August 1994 Respondent was advertising for electricians. On August 29 two union electricians, Kelly Browning and Mike Clary, applied and on August 30, 1994, union electrician Danny Aucoin applied. None of these highly qualified men were hired.

The record is clear that the union affiliated applicants for employment applied for work and were qualified in their craft with the exception of Broussard who well may be qualified but whose application was deficient. Further, these applicants were not hired. Still further, Respondent did hire employees for the positions these applicants applied for with the exception of the rebar-helper position and because of massive evidence of antiunion animus the only logical conclusion is that these applicants were denied hire because of their membership in the union. Having heard the testimony of most of these discriminatees and seen their applications and the applications of those who did not testify and all the other witnesses, it is obvious that these union affiliated applicants were bona fide applicants for employment. See *Town & Country Electric, Inc.*, supra.

The evidence of antiunion animus on Respondent's part with respect to the Exxon project in Baton Rouge is as follows:

1. HR 132 is a written human resources policy document of Respondent. It is, at a minimum, a nationwide policy. It provides that applications will remain active for 60 days and any exception to the policy must be approved by Respondent's vice president for human resources. HR 132 also contains a provision that there will be a hiring preference for Fluor Daniel certified craftsmen. It does not provide for a preference for applicants with experience with Respondent but who are not certified. Suffice it to say the following memo was sent on December 1, 1993, from Ed Martinez of industrial relations to Bill Austin about the staffing procedures of Respondent at the Exxon project. Copies of this memo were sent to Dave Harris who became project manager at the Exxon project. Bill Austin was the human resources manager at the Exxon project and in charge of hiring.

The memo stated:

In order to meet our staffing goals with qualified craft employees, and protect ourselves from unfair labor practice charges, the following preferential hiring plan is recommended for the Exxon project in Baton Rouge, Louisiana. To be effective, it is essential that this criteria be strictly adhered to. The plan requires that preferential hiring be given to applicants in the following order:

- (1) Fluor Daniel Certified
- (2) Fluor Daniel Experienced

(3) Others

The following recommendations are also made in an effort to further diminish the potential for the filing of any ULP charges:

Accept job applications only when jobs are available and when we intend to fill the position(s). Ensure all active applications on file are reviewed before accepting further applications. Position(s) for which applications are being accepted should be posted at the site employment office.

It is recommended that applications be individually numbered and remain valid for 30 days.

Human Resources must be prepared to justify why one person was hired over another, particularly for non-Fluor Daniel experienced employees.

Should anyone attempt to "drop off" applications in bulk, they must not be accepted. Applications "left on the counter" should immediately be put in an envelope and mailed back to the person or organization which left them. They should be notified as to the proper procedure for submitting an application. If at all possible, have a witness present to view the action taken.

It is obvious that this memo from industrial relations to staffing was the game plan to discriminate in hiring against union affiliated applicants and get away with it. If there was a law that prohibited discrimination in employment against veterans of the Vietnam War, Martinez' memo would read as follows:

In order to meet our staffing goals with qualified craft employees, and protect ourselves from charges that we discriminate against Vietnam veterans the following preferential hiring plan is recommended for the Exxon project in Baton Rouge, Louisiana. To be effective, it is essential that this criteria be strictly adhered to. The plan requires that preferential hiring be given to applicants in the following order:

- (1) Fluor Daniel Certified
- (2) Fluor Daniel Experienced
- (3) Others

The following recommendations are also made in an effort to further diminish the potential for the filing of any charge that we discriminate against Vietnam veterans:

- Accept job applications only when jobs are available and when we intend to fill the position(s). Ensure all active applications on file are reviewed before accepting further applications. Position(s) for which applications are being accepted should be posted at the site employment office.
- It is recommended that applications be individually numbered and remain valid for 30 days.
- Human Resources must be prepared to justify why one person was hired over another, particularly for non-Fluor Daniel experienced employees.
- Should anyone attempt to "drop off" applications in bulk, they must not be accepted. Applications "left on the counter" should immediately be put in an envelope and mailed back to the person or organization which left them. They should be notified as to the proper procedure for

submitting an application. If at all possible, have a witness present to view the action taken.

It is clear that, as modified, Respondent would be manifesting an intent and laying out a plan to discriminate against Vietnam vets and get away with it. It is obvious that the memo is the game plan on how to discriminate in employment against union affiliated applicants for employment and get away with it

Another aspect of this memo is interesting because it varies from the provisions of HR 132 and it is conceded by Respondent that no permission to vary from HR 132 was granted and variances were not permitted without permission. It further shows that, when it wants to vary from policy to discriminate against union applicants, Respondent simply does so, but if a policy (the 60-day period for active applications for example) assists in discriminating against union applicants that policy will be faithfully adhered to.

- 2. Fluor Corporation is the parent corporation for Respondent (Fluor Daniel, Inc.) and its union counterpart (Fluor Constructors) and yet while there is a hiring preference for someone who has experience with Respondent (Fluor Daniel, Inc.) there is no hiring preference for craftsmen who have experience with Fluor Corporation's union counterpart.
- 3. There is no hiring preference for salaried personnel (engineers, etc.) who have worked in the past for Respondent but there is a hiring preference for experience with Respondent among craftsmen. Needless to say engineers are generally not organized and craftsmen might be. The rationale for the policy is not to hire people who worked for Respondent in the past and did a good job because then there would be a preference for salaried employees but the rationale for the policy is to keep out unions and if you have to discriminate in hiring against union affiliated applicants for employment to do so then do it.
- 4. James "Kenny" Bueche (pronounced Bush) was a union boilermaker who applied for an ironworker position on February 1, 1994, a job for which he was qualified. He is a former employee of Respondent and Respondent claims it doesn't have his application. The dilemma facing Respondent since Respondent argues that they are wedded to hiring former employees over non-Fluor Daniel applicants is how can they explain their failure to hire Bueche. They cannot do so without admitting discrimination so they claim they never got his application. This is powerful evidence of antiunion animus and supports the overall finding that Respondent discriminated in hiring against union affiliated applicants for employment.
- 5. In late August 1994, Ed Martinez spoke with Rhonda Glover on the phone. Martinez is from industrial relations and was concerned about the unfair labor practice charges pending in Region 15. Glover was the person at that time in charge of craft hiring at the Exxon project.

Martinez told Glover he thought it would help the chances of Region 15 *not* issuing a complaint if Respondent could demonstrate that it hired some union affiliated applicants.

Shortly thereafter Glover did something she had never done before. Glover called Charles Dame, a young electrician and member of IBEW Local 995, and asked him to come in to the office and expand on his application by listing 42 months' experience. Dame was then offered a job and started work on September 6, 1994. Glover also hired Ricky Russell. Interestingly enough when the Respondent thought it might persuade Region 15 not to issue a complaint, Respondent found it easy to hire union affiliated applicants but not at any other time.

- 6. The only applicant that Glover ever asked to expand his application to list 42 months of experience was Dame. Glover testified that she regularly told applicants for journeymen positions to list 42 months' experience but with the exception of April 19, 1994, the evidence is that she never told the union applicants they had to list 42 months' experience on their applications. She and the other craft recruiter, Terry Wilson Burns, would review the applications submitted by the union applicants before the applicants left Respondent's office and although it was obvious in virtually every case that the applicants applying for journeymen jobs had listed less than 42 months' experience neither Glover nor Burns ever told the applicants they had to list 42 months of experience, but simply looked over the application and told the applicant that it looked okay and the applicant left. The applicants would never know that they had no chance whatsoever of being hired because they did not list 42 months experience. Glover and Burns knowingly and deliberately lulled the union applicants into a false sense of security that they had applied for a job and had a chance of getting one when their real opportunity for being hired was zero.
- 7. Respondent, through Ed Martinez' memo, reduced the time for an application being active from 60 to 30 days. If you read Martinez' memo, spelled out in item 1 above it is obvious that the 60-day active period was reduced to 30 days in order to assist in Respondent's discrimination in employment against union affiliated applicants. This is demonstrated by the fact that many high ranking officials of Respondent could offer no justification whatsoever for the reduction from 60 to 30 days, e.g., David Bordages, vice president of human resources, David Harris, Respondent's project manager for the Exxon project, Bill Austin, human resources manager at Exxon project in January 1994 and February 1994, Rhonda Glover, craft recruiter, and then Austin's successor as human resources manager at the Exxon project.

The rationale for the 60-day rule, according to Respondent's own witnesses, is that after 60 days most craftsmen will have found other work and no longer be interested in employment. This rationale breaks down in this case because by filing charges and pursuing litigation the applicants showed they were still interested in employment with Respondent.

8. Respondent's treatment of Jeff Armstrong is most telling. Armstrong is a paid union organizer for Pipefitters Local 198. On four occasions he went to Respondent's hiring office in Baton Rouge to apply for work at the Exxon project, i.e., February 1, April 19, May 10, and July 20, 1994. He was rejected for employment all four times.

According to craft recruiter Rhonda Glover, Armstrong was "underqualified" when he applied for an ironworkers job on February 1, 1994, because he did not list 42 months of qualifying experience but only 18 months of experience but she accepted his application and never said it was incomplete even though she looked it over.

According to Glover, Armstrong was "overqualified" for the pipefitter helper position Armstrong applied for on April 19, 1994. She claimed she did not like hiring journeyman for helper positions because they would be unhappy making less pay. Yet she hired many journeymen into helper positions but only if the person had worked for Respondent in the past but could not be hired as a journeymen because, for example, they had failed the welding test.

According to Glover, when Armstrong applied to take a pipefitter test and be hired as a pipefitter on May 10, 1994, he was told he could not take the pipefitter test because it was being given *only* to former employees of Respondent and not to anyone who had not previously worked for Respondent. He was not "qualified" to take the test because he had not worked previously for Respondent.

According to Glover, when Armstrong applied on July 20, 1994, for a job as an instrument helper she did not hire him because he was "overqualified."

Respondent had posted and was hiring ironworkers on February 1, pipefitter helpers on April 19, pipefitters on May 10, and instrument helpers on July 20, 1994. Armstrong was well qualified for each of these positions but Glover would not give him the time of day. Armstrong, it is clear, never had any chance whatsoever of being hired by Respondent and it was because he was a union affiliated craftsman. This is blatant discrimination.

9. As shown above, union electricians and union pipefitters applied for work with Respondent and were not hired. Their continued interest in being offered employment was manifested by charges filed on their behalf by their unions with Region 15 in New Orleans.

Nevertheless in August and September 1994 Respondent was in such desperate need of electricians, pipefitters, and welders that is subcontracted with ISC for electricians, with Harmony for pipefitters, and with J. E. Merit for pipefitters and welders. Needless to say ISC, Harmony, and J. E. Merit are all nonunion contractors.

10. Respondent claims that it religiously followed its policy of giving hiring priority first to Fluor Daniel certified craftsmen and then to Fluor Daniel experienced craftsmen, and while giving preference to applicants for employment makes sense and is legal if done because an employer wants employees who it knows from past experience are good workers the implementation of the policy must be reasonable. All too often it was anything but reasonable and was an excuse to not hire union affiliated applicants, for example, the following Fluor Daniel experienced applicants were hired over union applicants with impeccable records: Ryan Smith (guilty of possession of illegal weapon or alcohol), Claude Honnycutt (who had been fired three times in the past by Respondent for absenteeism), Kim Kitrell (who had been fired by Respondent for absenteeism and for failing a drug test), Claude Fortson (who had been fired twice for absenteeism and once for insubordination), Thomas Blacknon (whose coded entry reflected he had previously been fired by Respondent for endangering the safety of himself or others on the job). Thurmond Almaroad (who had been fired for insubordination), and Robert P. Jones (who had previously been convicted of assault with intent to kill).

11. Respondent was in such dire need of pipefitters, welders, and electricians that it sent out on September 21, 1994, 11,000 mailgrams to former employees looking for pipefitters and welders, it sent out on September 30, 1994, 9218 mailgrams to former employees looking for pipefitters and on October 7, 1994, it sent out 3300 mailgrams to former employees looking for electricians.

It cost 42 cents each to send out a mailgram and Respondent incurred this cost rather than consider and hire the union affiliated applicants who had applied for work and whose applications Respondent still had in its possession at the jobsite and who were pressing their job discrimination claims through Region 15 of the National Labor Relations Board.

- 12. Although Glover claimed that she *always* told journeymen applicants that they had to list 42 months of experience on their applications, and since most of the union affiliated applicants did not do so Respondent properly rejected them for employment. However, when confronted with the fact that many applicants who were hired had also *not* listed 42 months of experience Glover said that former employees of Respondent did *not* have to list 42 months of experience because the craft recruiter (her or someone else) could check their work experience in Respondent's computer by typing in the applicant's name and social security number. There is, I note, nothing on the application that provides you must list 42 months of experience if applying for a journeyman position.
- 13. Although Glover claimed she told all applicants of the 42 months' rule many discriminatees credibly testified that they were never told they had to list 42 months' experience, e.g., A. E. Ross, Kelly Browning, C. A. Lewis, Richard Fletcher, David Greer, William Blalock, Curtis Blount, John Kelly, Kelly Gauthereaux, Danny Aucoin, Ricky Achord, Jeff Burns, Ernest Green, Edwin Cook, Eugene Braund, Ricky Russell, Don Guarino, and Joe Aycock.

There was space on the application form for information about six prior jobs and although the form states that all prior employment should be listed and continuation sheets can be used continuation sheets were not routinely made available and people were not told that they were available if any event.

In the construction business employees go from job to job and, as A. E. Ross testified, if he listed every job his application would be the size of a telephone book.

The fact is these applicants were looking for work and had 42 months of experience, and would have and could have listed 42 months if they had been told that they would not be considered for employment if they had *not* listed 42 months of experience.

14. The experience of Charles Dame is also most telling. Dame engaged in concerted protected activity in complaining about a noxious gas emission and the lack of scaffolding on the jobsite.

On October 6, 1994, electrical foreman Doug Robinson told Dame to "quit fucking up." The only parties to this encounter were Dame and Robinson. Robinson denied he ever said this to Dame. I credit Dame. If Dame wanted to lie why not select a higher official of Respondent then a first line foreman. Robinson still works for Respondent and was not about to admit he

said something that may hurt Respondent's case. This implied threat is a violation of Section 8(a)(1) of the Act.

15. A few days later Dame went on strike against Respondent claiming it was a unfair labor practice strike because of Respondent's failure to hire union affiliated applicants for employment.

At the time he went on strike Dame was hired by another contractor, J. E. Merit, which contractor was also working at the Exxon refinery.

All employees who worked at the Exxon project wore badges issued by Exxon security. Exxon had a rule that employees could not be badged to more than one contractor. The basis for this rule was safety and accountability. If there was a major accident at the site Exxon wanted a good handle on who was on site. An employee could only have one security badge.

When Dame wanted to get a security badge to go on site to work for J. E. Merit he was told by Exxon security that he could not be issued a badge to get on site to work for J. E. Merit until Respondent turned in the security badge issued Dame as a result of his employment with Respondent. Respondent, claiming Dame was still their employee but on strike, refused to release Dame's security badge to Exxon and Exxon would not issue a new security badge to Dame and as a result Dame could not go to work for J. E. Merit.

Needless to say Respondent could have easily released Dame's security badge to Exxon security and kept Dame on their rolls as an employee. Their failure to do is evidence of union animus as well as a separate violation of Section 8(a)(1) and (3) of the Act.

16. Ricky Russell was hired in late August 1994. Russell is a union business agent for IBEW Local 995. After he was hired Russell tried to organize the employees and was told, at one point, by Supervisor James Laws that he was being disciplined or was going to be disciplined for union solicitation during what Laws claimed was worktime but what Russell said was breaktime. In any event Russell was not disciplined and I find no violation of the Act.

Michael Albritton, an employee of Respondent, testified that after Russell was hired he had a conversation with his foreman Clint Bamber. Albritton testified as follows:

- A. Mr. Bamber came in and he said he had something to tell us. He said it could get him in a lot of trouble if he told us, but that he felt like we had a right to know who we was working with. And he went on to tell us that he could get in trouble and all for it.
 - Q. Did he explain what it was that-
- A. He told us that Ricky Russell had hired in, and during orientation that he had stood up and told everybody he was organizing for the union and passed out union literature. And he said the hiring office must not know what they doing because Ricky Russell was the B.A. in Baton Rouge.
- Q. Did you say anything to him—or to Mr. Bamber at that time?
- A. We was just listening to him mainly because, you know, he was telling us, I guess, in confidence.
 - Q. Do you know what a B.A. is?

- A. I did not at that time.
- Q. And when did you learn what a B.A. was?
- A. I asked him what a B.A. was, and-
- O. Well, who is him?
- A. Clint Bamber.
- Q. Okav.
- A. And he told me that he was a head man for the union.
- Q. And was this during your conversation with regards to Ricky Russell that evening in the motor control room?
 - A. It was.
- Q. After he explained to you what a B.A. was do you recall him saying anything else? Let me withdraw that question. Did Mr. Russell work on your crew?
 - A. No, he did not.
 - Q. Do you know whose crew he worked on?
- A. He was—Clint was he—Mr. Bamber said he wanted to get him in our crew, but they had—so he could get rid of him. But they had already placed him in Marshall's—Martin's crew.
 - O. Who is Martin?
 - A. Martin was another electrical foreman on the job.

REMEDY

The remedy in this case should include a cease-and-desist order, the posting of an appropriate notice, the offering of positions to those applicants unlawfully refused hire because of their union affiliation and a make whole remedy for lost wages and benefits.

With respect to Palo Verde, if Respondent still has the service and maintenance contract with Arizona Public Service, those discriminatees (all of whom with the exception of Gary Evenson worked at Palo Verde for Bechtel Corporation) can be offered employment there.

With respect to the Exxon project I note that the building of the East Coker plant is completed. Respondent, however, moves from project to project and those applicants for employment unlawfully denied employment at the Exxon project can be offered jobs at other current projects of Respondent.

Those discriminates who were unlawfully denied employment as journeymen at either Palo Verde or Exxon should be permitted to be tested to be certified by Respondent in the craft for which they were unlawfully denied employment.

I will not disturb Respondent's hiring preference for Fluor Daniel certified or experienced applicants but it is to be used in the future only in a lawful manner. With respect to the 60-day period for applications remaining active at Palo Verde and the 30-day period for applications remaining active at Exxon these rules should not be used to discriminate. In law school one learns the concept that "the law abhors a vain act" and to require these applicants to have reapplied every 60 or 30 days when there were openings would be to ask them to engage in vain acts because Respondent had no intention of hiring them because of their union affiliation.

It should be noted that Respondent's practice was to keep all applications for employment for 1 year and only them to send the applications to storage. The applications were never destroyed.

The Board in *Hickmott Foods*, 242 NLRB 1357 (1979), held that a broad cease and desist order requiring a Respondent to cease and desist from "in any other manner" rather than the narrow "in this or any like manner" language should be reserved for situations where a Respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.

In light of the violations of the Act I find herein and bearing in mind prior litigation involving this same Respondent, i.e., *Fluor Daniel I,* supra, and *Fluor Daniel II,* supra, I will recommend a broad cease and desist order because of Respondent's demonstrated proclivity to violate the Act.

CONCLUSIONS OF LAW

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The three Charging Party unions are labor organizations within the meaning of Section 2(5) of the Act.

- 3. Respondent violated Section 8(a)(1) of the Act when its foreman Harry Sinclair at the Palo Verde project told an employee that applicants who write voluntary union organizer on their applications would not be hired.
- 4. Respondent violated Section 8(a)(1) of the Act when its foreman Doug Robinson at the Exxon project threatened an employee with unspecified reprisals for concertedly complaining about safety and health issues on the project.
- 5. Respondent violated Section 8(a)(1) and (3) of the Act when its supervisors and agents refused to release Charles Dame's security badge thereby preventing him from working for another contractor on the Exxon project after Dame had gone on strike against Respondent.
- 6. Respondent violated Section 8(a)(1) and (3) of the Act when it failed and refused to offer positions to any of discriminatees listed below in paragraph 2 of my recommended Order because of their union affiliation.
- 7. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[Recommended Order omitted from publication.]